2005

Utah transit Authority, Plaintiff-Appellee vs. Salt Lake City Southern Railroad Company, Inc., Defendant/Appellant. : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

UTAH TRANSIT AUTHORITY, Plaintiff-Appellee, vs. SALT LAKE CITY SOUTHERN RAILROAD COMPANY, INC., Defendant-Appellant.	)	Case No. 20050303-CA

BRIEF OF APPELLANT SALT LAKE CITY SOUTHERN RAILROAD COMPANY, INC.

Appeal from the Third Judicial District Court of
Salt Lake County, State of Utah
Judge Bruce C. Lubeck

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ORAL ARGUMENT REQUESTED

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PARTIES

The names of all parties to the proceeding before the trial court are included in the caption, and no separate list is required to comply with Rule 24(a)(1) of the Utah Rules of Appellate Procedure.

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JURISDICTIONAL STATEMENT

Salt Lake City Southern Railroad Company, Inc.'s appeal is from a final order and judgment entered by the Third Judicial District Court of Salt Lake County, State of Utah which is a "court of record." UTAH CODE ANN. § 78-1-2.1(3). Salt Lake City Southern Railroad Company, Inc.'s appeal is timely and from a final order and judgment of a court of record over which the Utah Supreme Court has jurisdiction. UTAH CODE ANN. § 78-2-2(3)(j); Utah R. Civ. P. 3 and 4. The Utah Supreme Court properly transferred this appeal to the Court of Appeals. UTAH CODE ANN. § 78-2-2(4) and § 78-2a-3(2). Therefore, this Court now has jurisdiction over this appeal. UTAH CODE ANN. § 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARD OF APPELLATE REVIEW

1. Did the trial court err in its construction of the Administration and Coordination Agreement between the parties, in granting indemnity in favor of Utah Transit Authority for litigation expenses incurred as a result of a lawsuit brought against both of the parties to this appeal by a bicyclist and his wife (George and Kathy Goebel); and should the trial court have granted Salt Lake City Southern Railroad Company, Inc.'s motion for summary judgment and ordered Utah Transit Authority to indemnify Salt Lake City Southern Railroad Company, Inc. for litigation expenses it incurred during the same lawsuit? This issue was preserved below in Salt Lake City Southern Railway Company, Inc.'s opposition to Utah Transit Authority's Motion for Summary Judgment (R. 503-737) and in Salt Lake City Southern Railroad Company, Inc.'s own Motion for Partial

Summary Judgment (R. 156-221).[1]

Standard of Review: Correction-of-error, because the construction of a contract is a question of law. *WebBank v. American General Annuity Service Corp.*, 2002 UT 88, ¶ 5, 54 P.3d 1139, 1144.

2. Is either party entitled to contractual indemnity from the other for the expenses, including attorney fees, they each incurred in defending an action filed by George and Kathy Goebel for injuries incurred because of an allegedly defective surface of a railroad crossing? This will require the Court to construe the contractual relationship of the parties under the terms of their Administration and Coordination Agreement in light of the undisputed facts that Utah Transit Authority owned the railroad at the subject crossing and had granted to Salt Lake City Southern Railroad Company, Inc. a limited easement to operate over that railroad. This issue was preserved below in the parties' cross motions. R.156-949.

Standard of Review: Correction-of-error, because construction of statutory duties of railroad owners and the construction of a contract are questions of law. *Taylor v. Johnson*, 1999 UT 35, ¶ 6, 977 P.2d 479, 480; *Platts v. Parents Helping Parents*, 947 P.2d 658, 661-62 (Utah 1997); *WebBank v. American General Annuity Service Corp.*, 2002 UT 88, ¶ 5, 54 P.3d 1139, 1144.

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[1]Salt Lake City Southern Railroad Company, Inc.'s motion was for summary judgment only on the issue of indemnity liability because at the time it was filed the Goebels' case against it had not been concluded and thus attorneys fees and costs were still being incurred. That case is now concluded and Salt Lake City Southern Railroad Company, Inc.'s indemnity damages are complete and can be presented if this case is remanded for that purpose.

STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings and Disposition Below

This action involves cross claims for contractual indemnification. R. 1-11, 15-131. It is related to a personal injury action filed by George and Kathy Goebel ("Goebels") against Salt Lake City Southern Railroad Company, Inc. ("SLCSR"), Utah Transit Authority ("UTA"), and other entities. Mr. Goebel was injured at a grade crossing UTA owned and over which SLCSR operated freight trains. Mr. Goebel was not hit by a freight train, and no train was involved in Mr. Goebel's accident. Rather, on February 19, 1998, Mr. Goebel fell from his bicycle and was severely injured while riding his bicycle westbound on 1700 South in Salt Lake City near or on the railroad crossings located at about 250 West. Goebels alleged a particular "gap" in the crossing surface caused Mr. Goebel to fall from his bicycle, and that the elimination of that gap would have prevented the accident. UTA and SLCSR were both sued by Goebels for failing to have eliminated the alleged "gap" at UTA's crossing. R. 5 (¶¶ 16-17).

UTA and SLCSR made demands upon each other for indemnification of any liability and expenses incurred in defending against Goebels' action. R. 2 (¶ 4), 5 (¶ 18), 27 (¶¶ 7-8), 128-31, 133 (¶¶ 7-8). Both refused to indemnify the other and, therefore, retained separate counsel. After lengthy discovery and just before trial, UTA settled with the Goebels, and it now seeks in this action to recover the amount it paid in settlement and its defense expenses. R. 6 (¶¶ 19-20). SLCSR proceeded to trial in the *Goebel* case and obtained a directed defense verdict after the close of all the evidence. The sole

ground for the directed verdict was that the Goebels failed to produce evidence to prove notice and an opportunity to remedy a dangerous condition. That directed verdict recently was affirmed on appeal in *Goebel v. Salt Lake City Southern Railroad Co.*, 2004 UT 80, 104 P.3d 1185. Consequently, SLCSR seeks in this action its defense expenses up through the Goebels' unsuccessful appeal. R. 28 (¶ 10). Indemnity is asserted by both parties to this action to be predicated upon a contract between them entitled "Administration and Coordination Agreement" (the "Agreement"). R. 4, 37-68 (the Agreement also is included in the Addendum at Tab 1).

On June 30, 2004 and August 12, 2004, SLCSR and UTA brought cross motions for summary judgment before the trial court. R. 156-311. SLCSR's motion was for partial summary judgment only because the Goebels' appeal then was pending, and the total amount of damages to be awarded SLCSR from UTA could not then be determined. On March 2, 2005, the trial court decided to grant UTA's motion and deny SLCSR's motion. R. 962-73. A judgment for UTA and against SLCSR, for $238,190.69 plus interest and costs, was entered on March 10, 2005. R. 974-76. SLCSR timely filed its Notice of Appeal on March 29, 2005. R 983-85.

B. Statement of Facts

1. The Subject Crossing and Its Ownership

The tracks at the subject crossing had been owned for many years by the Union Pacific Railroad Company ("UP"). On October 30, 1992, more than five years before Mr. Goebel's accident, UP sold these tracks to UTA. R. 319-76. At that time, UTA intended

to build and operate light rail passenger service ("TRAX") on this railroad right-of-way but had no intention to provide freight service to the existing freight customers located along these tracks. R. 3 (¶ 9). SLCSR was formed to continue freight service to these customers. Thus, when UP sold the tracks to UTA, UP retained a limited **easement**[2] which allowed it to continue freight service over what now is UTA's right of way. R. 377-83. This easement was transferred to SLCSR. R. 3 (¶¶ 10-11), 384-91. At the time of Mr. Goebel's accident, UTA owned the right-of-way, and SLCSR only had a limited right (easement) to operate freight trains over some of UTA's tracks for the purpose of providing freight service. The tracks had not been leased to SLCSR nor had UTA otherwise surrendered possession or control of the tracks to SLCSR. *See Goebel*, 2004 UT 80, ¶ 5, 104 P.3d at 1189.

Many materials can be used to construct crossings. For example, some crossings are simply made of dirt or asphalt. For many years, however, wooden planks were the primary material used for crossings on more traveled roadways. Crossings built with large rubber pads became more common in recent years, and now crossings are being built with concrete panels. At the time of Mr. Goebel's accident, the subject crossing was made of large rubber pads. *Id.*, ¶ 4.

At the time of the accident, UTA was in the process of improving its railroad line, including the **replacement of its crossing surfaces** with cement panels instead of wooden planks or rubber pads. Crosby Mecham, an employee of UTA, described himself

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[2]Although the parties designated this to be an "easement," a careful reading of the rights therein retained more closely appear to be a license.

as knowing more about the railroad property UTA purchased from UP than any other employee of UTA. R. 792, 818-19. He testified that he was involved personally with UTA's decision to replace its rubber crossing pads with concrete panels for maintenance reasons. R. 797-802. Indeed, Mr. Crosby understood that since 1992 "UTA owned the property and UTA was responsible to allocate or -- to maintain or allocate as it saw fit." R. 805. UTA's decision to improve all crossings to concrete evolved in 1996 as money was received to proceed with the TRAX project. R. 807-09. Actual construction projects on the TRAX line also predated Mr. Goebel's accident. R. 822-24. At the time of Mr. Goebel's accident in 1999, "everybody knew it [the subject crossing] was going to be replaced." R. 822. Removal and replacement of the rubber pads at the subject crossing began in July of 1998, **by UTA**, some five months after the accident, as part of UTA's project to improve its railroad. R. 314-15. UTA paid for that upgrade. R. 816. The improvement of the crossing surface at 1700 South was pursuant to decisions made solely by UTA and was done by UTA **without any involvement of, or even input from, SLCSR**.

Before UTA removed and replaced the rubber pads with concrete panels after the accident and pursuant to its pre-accident plan to do so, the rubber pads between the rails (the "gauge panels") were nominally 29 ½" x 72" and two pads placed side by side were required to fill the space between the rails. Pads outside the rails (the "field panels") were nominally 22 ½" x 72" and one pad was placed outside each rail for each six linear feet (72 inches) of track. Thus, at the time and place of the accident, there were a total of four

pads for each six linear feet of track. At 1700 South, there were two sets of rails and a total of forty pads for each set of rails that crossed that street. The pads were abutted to each other and screwed into the railroad ties. *See* R. 604-05.

Given the width of a street such as 1700 South, there has to be seams where the rubber pads or wooden planks abut each other. It generally is not feasible to manufacture and install a single pad or plank that would extend the entire width of such a roadway. Therefore, all crossings made of rubber pads or wooden planks and many made of cement panels have seams which generally run in the direction of the highway traffic. Over time, these seams widen from the effects of traffic, debris, and the icing and thawing of the debris that works its way into the seam. Thus, seams (or what the Goebels called "gaps") may widen to some extent over time. Usually these seams fill with dirt and other small particle roadway debris, essentially eliminating an actual "gap." *See* R. 606-07.

Of the eighty rubber pads at the 1700 South crossing, only eight were ever relevant to Goebels' allegations. These pads were at the north end of the western set of rails. They were numbered one through eight for consistent reference to them during the trial of Goebels' case, and the seams between the numbered pads were designated by reference to the abutting numbered pads. *See* photograph of crossing attached at R. 605, also included in the Addendum at Tab 2. Of the eight pads, the one most south and east was numbered "1." The next three pads to the west on the south side were pads "2," "3" and "4." Pad "5" was the most north and west of the eight pads, and pad "8" was the pad most to the north and east. *Id.*

2. The Goebels' Lawsuit

On February 18, 1998, Mr. Goebel was riding his bicycle to work on his usual route. As he proceeded westbound on 1700 South and when he was on, or very near to, the westernmost railroad crossing at about 250 West, his bicycle suddenly cartwheeled. He retained no recollection of his accident or what caused him to fall. A motorist immediately to the left of Mr. Goebel observed the rear wheel of the bicycle suddenly cartwheel into the air over both Mr. Goebel and the front wheel. This motorist did not observe anything he thought to be a cause of this accident. There were no other witnesses to the accident. *Goebel*, ¶ 4.

Laying in the hospital, Mr. Goebel had no idea as to what caused his accident. *Goebel*, ¶ 7. Mrs. Goebel went to the scene two or three days after the accident. Once there, she formulated a theory that on the date of the accident one particular space then existing between two of the gauge panels (those between the rails) was of such a precise width and depth that it barely accommodated the front tire of Mr. Goebel's bicycle. This was the gap between pads that were referred to as pads number two and seven. *See* Addendum at Tab 2. She also noted the next seam in the gauge panels to the west but still between the rails. This "gap" is between pads number three and six. *Id.* She determined this gap to be progressively more narrow until it could not have accommodated her husband's bicycle tire. She surmised that the bicycle tire traveled into the two-seven gap and then was pinched or wedged in the three-six gap so as to stop the rotation of the front wheel of the bicycle. *See* R. 606. This particular gap was the focus of the Goebels'

initial complaint and each amended complaint.

Some two and one-half years after the accident and two years after the rubber pads had been taken out of the ground by UTA during its crossing improvement project, Goebels' accident reconstruction expert observed dents in the rims of both of Mr. Goebel's bicycle wheels which he believed evidenced that the wheels had struck a hard object with a dramatic amount of force at the time of the accident. This conclusion was confirmed by Goebels' bicycle expert. There was no hard object which could have caused these dents in the two-seven and three-six gaps located in the gauge panels between the rails which had been the focus of the litigation up to that point in time. Goebel's accident reconstructionist concluded the pinch theory not to be viable and, in his opinion, a different gap was now the most likely cause of the accident. This previously unnoteworthy gap was to the east of the east rail between two field panels. It is the "gap" between pads numbered one and eight. *See* R. 605 and 607, and Addendum at Tabs 2 and 3. Goebels' expert believed Mr. Goebel's front and rear tires and wheels traveled into this particular "gap" and were channeled by the "gap" into the east rail which in his opinion produced the dents in the wheel rims and caused the accident. *Goebel*, ¶¶ 6 and 13.

3. The Utah Supreme Court Decision in the Goebels' Lawsuit

The duty which the Goebels claimed both UTA and SLCSR had breached are imposed by Utah Code sections 10-7-26(2), 10-7-29 and 56-1-11, and Salt Lake City Ordinance ¶ 14.44.030. Utah Code § 10-7-26, included in the Addendum at Tab 4,

expressly states that it is limited to any company that "owns or operates railway tracks." It does not state that it pertains to companies that own or operate locomotives or rolling stock over another company's railway or railroad tracks. This narrow definition expressly applies to § 10-7-29, included in the Addendum at Tab 5, as well as § 10-7-26. *See* UTAH CODE ANN. § 10-7-26(1). Utah Code § 56-1-11, included in the Addendum at Tab 6, expressly applies only to railroad companies that own tracks that cross public streets and highways. That statute, in its entirety, states, "Every railroad company shall be liable for damages caused by its neglect to make and maintain good and sufficient crossings at points where any line of travel crosses **its road**." UTAH CODE ANN. § 56-1-11 (emphasis added). The ordinance at issue, included in the Addendum at Tab 7, also expressly pertains to "their [railway companys'] **tracks**" that are upon or across a city street. This ordinance also is expressly limited to the entity that owns the "rail**road**" not to other entities who own or operate trains over someone else's "rail**road**."

Railroad companies may or may not own rail**roads** (tracks). The distinction between entities that merely operate trains over someone else's tracks and entities which own or operate (control the use of) the tracks, must be recognized when the issue is the statutory or ordinance based duty to maintain those tracks. Although a "railroad company" may or may not own tracks, a "rail**road**" is not a locomotive or a train. Rather, a "railroad" is "a road composed of parallel steel rails supported by ties and providing a track for locomotive drawn trains and other rolling stock." American Heritage Dictionary at 1078, definition 1 (1973).

The Utah Supreme Court acknowledged that SLCSR's "operation of the railroad tracks in question is limited to freight service pursuant to the easement, and is governed by the Agreement." *Goebel*, ¶ 16. Nevertheless, it held that based upon the facts presented, the extent of SLCSR's operations on the subject tracks demonstrated that it had sufficient control of the tracks to make it an "operator" of those tracks. With its understanding of the facts, the Utah Supreme Court held that as between SLCSR and the Goebels, SLCSR owed the Goebels the legal duty "to keep the crossing safe for the traveling public." *Id.*

> As the trial court explained, the "'operating a railway' language . . . is broad enough to encompass [SLCSR's] operation, use and utilization of the easement that they [the Goebels] had supported by the evidence in this particular case. Only different statutory language or different factual circumstances could convince us that Southern's regular and longstanding use and control of trains on the railway did not amount to operation of a railway." *Id.* (emphasis added).

In summary, the Utah Supreme Court held that SLCSR owed a statutory duty to maintain a safe crossing for the public because of the facts then before it pertaining to SLCSR's use and control of trains on UTA's tracks, not because that duty was imposed upon SLCSR or assumed by SLCSR by the subject Agreement.[3] In other words, the Utah

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[3]The only reference by the Supreme Court to a provision of the Agreement was to an inapplicable provision and it was misleading. The *Goebel* court stated, "According to the Agreement, [SLCSR] has the 'exclusive authority to manage, direct and control all railroad and railroad-related operations on' the tracks *designated for freight use*, and has 'exclusive authority to control operations of all trains, locomotives, rail cars and rail equipment and the movement and speed of the same.'" *Goebel*, § 16 (emphasis added). The quoted contract language is from section 5.2. That section of the Agreement is limited to "Freight Trackage." The subject crossing was not part of what was designated as "Freight Trackage." The subject crossing was part of "Joint Trackage" on which both UTA and SLCSR can operate. *See* Agreement, §§ 5.3 *et seq.* UTA, in the case at bar,

Supreme Court recognized that SLCSR's rights to operate over UTA's property was governed by the Agreement, and the exercise of those rights made SLCSR subject to the above-discussed statutory duties, but the Utah Supreme Court never construed what duties and obligations SLCSR contractually assumed under that Agreement.

UTA had settled with the Goebels before trial and UTA was not a party to the *Goebel* appeal. The Utah Supreme Court did not consider whether or not the subject statutes and the ordinance also applied to UTA. It is undisputed that UTA remained the owner of the railway tracks at this crossing. Moreover, a reading of the Agreement demonstrates that UTA also retained control over this roadway. *E.g.*, Agreement, §§ 2.1 and 5.3 *et seq.* Indeed, UTA unilaterally, and without any request or input from SLCSR, tore out and replaced the subject crossing after Mr. Goebel's accident pursuant to its prior plans to do so. R. 792, 797-802, 805, 807-09, 814-16, 818-19, 822.

Therefore, although the Utah Supreme Court held that SLCSR owed a statutory duty to the Goebels, it did not interpret the subject Agreement for any indemnity claims of the contracting parties. It did not hold SLCSR owed a contractual duty to UTA to improve UTA's crossings for travelers like Mr. Goebel. It remains to be determined by this Court whether UTA or SLCSR had the primary contractual obligation of crossing maintenance and improvement or whether they both equally shared this responsibility.

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agrees that the subject crossing was part of designated "Joint Trackage." R. 230 (¶ 7); 314 (¶ 8). As to "Joint Trackage," the Agreement provides that "UTA shall manage, direct and control . . . all activities" from 5.01 a.m. to 11:59 p.m. Monday through Friday and all day Saturday and Sunday. Agreement, §§ 5.4 and 5.7. Clearly, SLCSR did not have exclusive control over the subject crossing.

4. The Cross Claims for Indemnification in the Instant Action

Both parties claimed in their summary judgment motions that only the other party had the contractual obligation to maintain the subject crossing for the benefit of bicyclists traveling along 1700 South. Had UTA and SLCSR not entered into a contract regarding the limited use and maintenance of UTA's tracks, there would be no doubt that UTA, and only UTA, was responsible to discharge (at the 1700 South crossing) the duties imposed upon the owners and operators of railroad tracks by the aforementioned statutes and ordinance.

Therefore, both parties in this case base their claims of indemnity upon the terms of the subject Agreement executed by them on March 31, 1993. The only crossing maintenance obligation contractually imposed upon SLCSR by that Agreement is the obligation to repair any damage to the crossing that is caused by its use of the tracks. SLCSR is only actually **required** to "maintain, repair and renew [certain Freight and Joint Trackage it used] so as to preserve the present condition of the track, grade crossings and signal facilities." Agreement, §§ 3.1 and 3.3 (emphasis added).

The Agreement also provides for SLCSR to perform above this minimum level of maintenance but only if SLCSR deems such maintenance **necessary for Freight Rail Services** and this right is subject to UTA's prior written approval if such work requires any modification of the crossing. *Id.*, §§ 3.1, 3.3 and 4.1

The Agreement clearly does not state that SLCSR was to assume **all** track or crossing maintenance duties of UTA. Nor is there any delegation or transfer of UTA's

statutory duties to maintain crossings. The Agreement further provided that SLCSR "shall have no right or obligation to conduct and **shall not conduct**, directly or indirectly . . . **any other activity whatsoever** on the Right-of-Way that **is not necessary to Freight Rail Service**." *Id.*, § 2.1.

Moreover, UTA retained control over its right of way, such as by retaining the right to designate the track SLCSR could use, to realign all of its track, even track SLCSR was allowed to use, to limit the times of SLCSR's use, and to control SLCSR's ability to alter or modify UTA's property. In fact, as discussed above, UTA was engaged in a program of improving its railroad property for its TRAX service, including improving the surface of its crossings while SLCSR was operating freight trains over UTA's crossings in accordance with UTA's restrictions. Thus, SLCSR based its indemnification position on UTA having the duty, as the owner and controller of its railroad, to assure its crossing was safe for bicyclists like Mr. Goebel if such was required by the statutes and ordinance relied upon by the Goebels. UTA, on the other hand, based its indemnification position on a claim that it was the intent of the parties that SLCSR do all crossing maintenance and necessary improvements until TRAX became operational.

The trial court adopted UTA's claim. However, the Agreement does not say what UTA claims to be the "intent" and UTA's (and the trial court's) interpretation of the parties' "intent" rewrites the Agreement. The contract language that SLCSR has the duty to maintain only "to the standards it deems necessary for Freight Rail Service" and to preserve the "**present** condition" cannot be construed to mean SLCSR assumed "all" of

UTA's crossing ownership and control duties, including any duty to improve or upgrade the condition of its crossings for the possible benefit of bicyclists. If that were the case, the Agreement could have and should have simply provided that SLCSR assumed "all" of UTA's maintenance obligations until TRAX began operating.

The trial court did not clearly consider the possibility that both UTA and SLCSR owed a duty to provide a reasonably sufficient crossing to the traveling public. The Agreement only provides for indemnity when one and not the other has a contractual obligation that is not discharged. Indemnity is only imposed if a defined "Loss or Damage results from . . . the maintenance . . or other acts or omissions of only one of the parties . . .." Agreement, § 7.2(a). "When such Loss or Damage results or arises in connection with the acts or omissions of **both parties**, . . . such liability shall be borne by the party or parties responsible under applicable law." *Id.*, § 7.2(b) (emphasis added).

Finally, the Agreement expressly states that it is to be construed without regard to "the judgment of any court to the contrary and otherwise applicable law regarding liability." *Id.*, § 7.3 Thus, this Court could (and should) disregard the ruling in *Goebel* (which only determined the legal rights between the Goebels and SLCSR) in determining the contractual rights between UTA and SLCSR as expressed in their Agreement.

5. The Relevant Terms of the Agreement

The Agreement reads, in pertinent part, as follows:

SECTION I. DEFINITIONS

> The following terms and phrases shall be defined as follows for the purposes of this Coordination Agreement:

* * *

"Freight Easement" shall mean the easement acquired by [SLCSR] for common carrier rail **freight operations** on the Right-of-Way pursuant to the terms of the Easement Agreement.

* * *

"Freight Rail Service" shall mean the common carrier rail **freight operations** to be conducted by [SLCSR] on the Right-of-Way.

* * *

"Freight Trackage" shall mean any Joint Trackage and/or Passenger Trackage, which is **designated by UTA** to be Freight Trackage pursuant to Section 2.3 hereof, or any additions to the existing trackage constructed by [SLCSR] on the Right-of-Way after the Closing Date pursuant to Section 4.1 hereof.

"Joint Trackage" shall mean the trackage affixed to the Right-of-Way as of the Closing Date that was included in the Freight Easement, (described in Exhibit "A" hereto) unless such trackage is redesignated pursuant to Section 2.3 hereof, **or any Freight Trackage or Passenger Trackage designated by UTA to be Joint Trackage pursuant to Section 2.3 hereof**.

"Loss or Damage" shall mean all costs, liabilities, judgments, fines, fees (including without limitation reasonable attorneys' fees and disbursements) and expenses (including without limitation defense expenses) of any nature arising from or in connection with death of or injury to persons, including without limitation employees of the parties; or damage to or destruction of property, including the Joint Trackage, the Freight Trackage, the Passenger Trackage or any property on the Right-of-Way, in connection with Freight Rail Service or Passenger Service on the Right-of-Way; or business losses resulting from or in connection with any act or omission giving rise to a claim for Loss or Damage.

* * *

"Passenger Trackage" shall mean all segments of trackage constructed by UTA on the Right-of-Way after the Closing Date pursuant to Section 4.2 or 4.4 hereof, or any Freight Trackage or Joint Trackage hereafter **designated by UTA** to be Passenger Trackage pursuant to Section 2.3 hereof.

* * *

"Right-of-Way" shall mean the following described portions of the **property interests conveyed by UPRR to UTA pursuant to the terms and conditions of the Purchase Agreement: all right-of-way, trackage, and structures included in or adjacent to the property** described in Parcels No. 1 and 2 of Exhibit "A" to the Purchase Agreement, including all real property shown and described in the Maps and other documents regarding the right-of-way which were included in Exhibit "A" to the Purchase Agreement, and **all fixtures, tracks, rails**, ties, switches, **crossings**, tunnels, bridges, trestles, culverts, buildings, structures, facilities, leads, spurs, turnouts, tails, sidings, team tracks, signals, crossing protection devices, railroad communications systems, poles and **all other operating appurtenances that are situated: (1) on or adjacent to the trackage** formerly constituting part of UPRR's Provo Subdivision Line from the Salt Lake County/Utah County boundary line (approximately UPRR milepost 775.19) to Ninth Street Junction (which is on the North side of 900 (NINTH) South Street in Salt Lake City at approximately UPRR milepost 798.74); and (2) **on or adjacent to the trackage** formerly constituting UPRR's Lovendahl Spur, also known as the Midvale Lead, which departs from the trackage referenced above in a southwesterly direction at approximately 6400 (SIXTY-FOUR HUNDRED) South Street in Murray, Utah (approximately former UPRR milepost 790.52), crossing under both I-15 and the Denver and Rio Grande Western Railroad Company ("D&RGW") main line, and then heading south to approximately 7400 South, to the point of intersection with the D&RGW right of way, a distance of approximately 1.4 miles.

* * *

SECTION 2. FREIGHT RAIL SERVICE; PASSENGER SERVICE

2.1 Pursuant to the terms and conditions of the Easement Agreement, [SLCSR] shall have the exclusive right and obligation to provide Freight Rail Service on the Freight Trackage and the Joint Trackage. **[SLSCR] shall have no right or obligation to conduct, and shall not conduct, directly or indirectly**, Freight Rail Service on the Passenger Trackage or **any other activity whatsoever on the Right-of-Way that is not necessary to Freight Rail Service**. UTA shall have no right or obligation to conduct, and shall not conduct, directly or indirectly, Freight Rail Service on the Right-of-Way.

2.2 UTA shall have the exclusive right to conduct, by itself or through UTA's designee or otherwise, Passenger Service on the Right-of-Way. **[SLCSR] shall have no right or obligation to conduct, and shall not conduct, directly or**

indirectly, Passenger Service on the Right-of-Way; provided, however, that UTA and [SLCSR] may arrange, under a separate written agreement, for [SLCSR] to perform certain service on behalf of UTA with respect to the Passenger Service.

2.3 **UTA may** from time to time, upon 30 days written notice to [SLCSR], **change any track designation (Freight Trackage, Passenger Trackage or Joint Trackage) to any other track designation**; provided, however, that no such change in track designation shall unreasonably interfere with [SLCSR]'s Freight Rail Service on the Right-of-Way; provided, further, that the parties may agree to immediate track redesignations to respond to emergencies or the needs of the parties. UTA may not designate trackage as Freight Trackage without the written consent of [SLCSR] if such trackage is (1) then being used for Passenger Service, or (2) then not being used for Freight Rail Service. In order to ensure safe, economical and reliable freight rail service and Passenger Service on the Right-of-Way, the parties shall establish a Coordination Committee. The Coordination Committee will convene to resolve those administrative and coordination matters designated for Coordination Committee resolution by the terms of this Coordination Agreement as well as any other matters, upon agreement of the parties. The Coordination Committee shall be composed of two representatives from each party. The chief executive officer of each of [SLCSR] and UTA also shall be ex officio members of the Coordination Committee.

SECTION 3. MAINTENANCE; ALTERATIONS

3.1 **[SLCSR] shall be responsible for the maintenance, repair and renewal of the Freight Trackage and shall maintain, repair and renew the same to the standards it deems necessary for Freight Rail Service; provided that [SLCSR] shall, at a minimum, maintain, repair and renew the Freight Trackage so as to preserve the present condition of track, grade crossings and signal facilities, as described on Exhibit "B" hereto.**[4] **[SLCSR] shall bear all costs and expenses of maintenance, repair and renewal of the Freight Trackage.** Nothing herein shall relieve [SLCSR] of the obligation to perform maintenance, repair and renewal on the Freight Trackage in a good and workman-like manner and in compliance with all applicable laws and regulations.

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[4]Exhibit B to the Agreement is attached to the Agreement as part of Tab 1. R. 68. There is no mention that all or any crossings were seam, or gap, free or safe for bicyclists. It merely is stated that UTA's grade crossings "are in good condition." Thus, SLCSR only had the obligation to not allow deterioration or its use of the crossings for freight operations to adversely affect the existing "good condition" of the crossings. Nowhere does SLCSR agree to improve or maintain crossings to be free of gaps or otherwise safe for bicyclists.

3.2 UTA shall be responsible for the maintenance, repair and renewal of the Passenger Trackage and shall maintain, repair and renew the same to the standards it deems necessary for Passenger Service; **UTA shall bear all costs and expenses of maintenance, repair and renewal of the Passenger Trackage.**

3.3 Subject to Sections 3.4 and 10.2, [SLCSR] shall be responsible for and shall pay the costs of the maintenance, repair and renewal of the Joint Trackage and shall maintain, repair and renew the same to the standards it deems necessary for Freight Rail Service; provided that [SLCSR] shall, at a minimum, maintain, repair and renew the Joint Trackage so as to preserve the present condition of track, grade crossings and signal facilities, as described on Exhibit "B" hereto.[5] Nothing herein shall relieve [SLCSR] of the obligation to perform maintenance, repair and renewal on the Joint Trackage in a good and workman-like manner and in compliance with all applicable laws and regulations.

3.4 **Upon written notice to [SLCSR]** at any time, but at least sixty (60) days prior to commencement of Passenger Service, **UTA shall undertake and assume all costs of maintenance, repair and renewal of the Joint Trackage.** Upon assumption of maintenance, repair and renewal of the Joint Trackage, UTA shall maintain, repair and renew the Joint Trackage to the standards it deems necessary for Passenger Service; provided that **UTA shall, at a minimum, maintain, repair and renew the Joint Trackage so as to preserve the track to FRA Class I track and grade crossings and signal facilities to their then current condition. [SLCSR] hereby acknowledges that the present condition of track and signal facilities is sufficient for its Freight Rail Service. If UTA fails to maintain, repair and renew the Joint Trackage in accordance with the standard set forth above, [SLCSR] shall have the right to maintain, repair and renew the Joint Trackage to the standard necessary to fulfill its rail carrier obligations.**

SECTION 4. CONSTRUCTION; MODIFICATIONS

4.1 If [SLCSR] reasonably determines that Modifications are required to accommodate its Freight Rail Service over the Freight Trackage or the Joint Trackage, [SLCSR] shall bear all expenses in connection with such Modifications, including without limitation the annual expense (for so long as such Modifications are a part of the Freight Trackage or the Joint Trackage) of maintaining, repairing, inspecting, and renewing such Modifications, including any increased operating costs associated with passenger Service. **[SLCSR] shall not**

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[5] *See supra* note 4.

commence construction or other work in connection with such Modifications to the Joint Trackage or the Freight Trackage without entering into a Modification Agreement with UTA and obtaining UTA's written consent. The parties shall, through the Coordination Committee, negotiate in good faith to enter into a Modification Agreement for [SLCSR]'s Modifications to the Joint Trackage or the Freight Trackage necessary for Freight Rail Service, but such Modifications shall not interfere with or impede Passenger Service over the Right-of-Way. **All Modifications made by [SLCSR] to the Freight Trackage or the Joint Trackage within the Right-of-Way shall become the property of UTA.**

4.2 **UTA plans to construct additional trackage** (which, in the absence of some other designation, shall initially be deemed to be Passenger Trackage) **on the Right-of-Way so that, through usage of existing and such additional trackage, the Right-of-Way may accommodate Freight Rail Service and Passenger Service.** UTA shall have the right to construct such additional trackage as it deems necessary; provided, however, that no such construction shall unreasonably interfere with [SLCSR]'s Freight Rail Service on the Right-of-Way but that **[SLCSR] shall reasonably cooperate with UTA so as to allow for the construction of additional trackage on the Right-of-Way.** UTA and [SLCSR], through the Coordination Committee, shall cooperate to secure (from a third party independent contractor) temporary substitute service during construction or modification periods; the cost of substitute service to freight customers during construction or modification periods shall not be borne by [SLCSR]. UTA shall be responsible for the construction of additional trackage for Passenger Service on the Right-of-Way and shall construct the same to the standards it deems necessary for Passenger Service; UTA shall bear all costs and expenses of construction of such additional trackage.

4.3 **UTA shall have the right, upon 30 days written notice to [SLCSR], to realign the Freight Trackage, the Passenger Trackage or the Joint Trackage on the Right-of-Way;** provided, however, that no such realignment shall unreasonably interfere with [SLCSR]'s Freight Rail Service but that **[SLCSR] shall reasonably cooperate with UTA so as to allow for such realignment.**

* * *

SECTION 7. ALLOCATION OF LIABILITY

7.1 **Both parties shall undertake to comply with all applicable** federal, **state and local laws** and regulations, and all applicable rules, regulations or orders promulgated by any court, agency, municipality, board or commission. **If**

any failure of either party to comply with such laws, rules, regulations or orders in respect to the use of the Right-of-Way **results in** any fine, penalty, cost or charge being assessed against the other party, or any **Loss or Damage, the party which failed to comply agrees to reimburse promptly and indemnify, protect, defend and hold harmless the other Party for such amount**.

7.2 **Notwithstanding (i) anything else contained in this Coordination Agreement or (ii) otherwise applicable law regarding allocation of liability based on fault or otherwise, as between the parties hereto liability for Loss or Damage resulting from or in connection with the maintenance, construction, operations or other acts or omissions of either party shall be borne and paid by the parties as follows**:

(a) **When such Loss or Damage results from or arises in connection with the maintenance, construction, operations or other acts or omissions of only one of the parties, regardless of any third party involvement, such Loss or Damage shall be borne by that party**; and

(b) **When such Loss or Damage results from or arises in connection with the act or omissions of both parties, or of third parties, or from unknown causes, Acts of God, or any other causes whatsoever, such liability shall be borne by the party or parties responsible under applicable law.**

7.3 Each party agrees that it will pay for all Loss or Damage **the risk of which it has herein assumed, the judgment of any court to the contrary and otherwise applicable law regarding liability notwithstanding,** and will forever indemnify, protect, defend and hold harmless the other party, its successors and assigns, from such payment.

* * *

SECTION 13. GENERAL PROVISIONS

13.1 This Coordination Agreement and the agreements referenced herein constitute the entire agreement between the parties hereto with respect to the subject matter contained herein and there are no agreements, understandings, restrictions, warranties or representations between the parties other than those set forth or provided for herein. All Exhibits attached hereto are hereby incorporated by reference into, and made part of, this Coordination Agreement.

13.2 This Coordination Agreement may not be amended except by an

instrument in writing signed by the parties hereto.

See R. 37-68, also attached hereto in the Addendum at Tab 1.

SUMMARY OF ARGUMENT

The duties imposed by the subject statutes and the ordinance to sufficiently maintain railroad crossings for the benefit of the traveling public is a duty imposed upon owners and operators of railroad tracks. In this case, that duty was and is imposed upon UTA. There is nothing in the subject Agreement whereby UTA delegated, and SLCSR accepted, UTA's legal duty to maintain sufficient crossings for the traveling public. After the execution of the Agreement, UTA retained control over the sufficiency and safety of the crossing surface at 1700 South and 250 West for its use by bicyclists. The Agreement only required SLCSR to maintain the crossing in its present condition, not improve it for its use by cyclists. The Agreement only required SLCSR to improve a crossing surface if, in its sole discretion, such improvement was necessary for freight service. There has been no claim, and a claim cannot be honestly asserted, that smoothing the crossing surface for the benefit of cyclists was necessary to provide freight service or to put the crossing in a condition in which it existed at the time the Agreement was executed.

UTA not only owned the crossing but retained control over the crossing to improve its surfaces. UTA ultimately did improve the crossing surface for the traveling public when it replaced the rubber pads, that existed at the time the Agreement was entered, with concrete panels.

SLCSR should be awarded indemnity as against UTA since under the terms of the

Agreement UTA had not delegated its duty to maintain this crossing surface for use by cyclists to SLCSR. This determination is to be made without regard to the *Goebel* decision which determined the statutory duty between SLCSR and the Goebels but not the contractual obligations between SLCSR and UTA under the Agreement.

Alternatively, both UTA and SLCSR owed statutory duties, if not contractual duties, to improve the surface of this crossing for its use by cyclists. Since indemnity under the contract is applicable only if just one of the parties had an obligation and failed to discharge it, neither party is entitled to indemnity for their defense of the Goebels' action if this Court determines SLCSR is not entitled to be indemnified by UTA under the Agreement.

ARGUMENT

Point 1: It was proper that this matter be determined upon cross motions for summary judgment and this Court should now interpret the subject Agreement and determine which if either party owes indemnity to the other under the terms of that Agreement.

This is an indemnity action based upon a written contract.[6] Both parties claim they are contractually entitled under the same written contract be to indemnified by the other. Both parties moved for summary judgment to have the trial court interpret the indemnity

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[6]The parties also alleged causes of action for "implied indemnity" and "common law indemnity." These are not separate and distinct causes of action. In *Freund v. Utah Power & Light Co.*, 793 P.2d 362 (Utah 1990), the Utah Supreme Court questioned whether implied indemnity was recognized in Utah. *Id.* at 366-70. In *Davidson Lumber Sales, Inc. v. Bonneville Investment, Inc.*, 794 P.2d 11 (Utah 1990), the Utah Supreme Court stated that "[a] common-law indemnity action is based on a theory of quasi-contract or contract implied-in-law." *Id.* at 26. If there is such a cause of action, it is contractual in nature and adds nothing to the instant action involving a written contract. *See* Agreement, § 13.

provisions of the Agreement as a matter of law. Neither party requested discovery under Utah R. Civ. P. 56(f) in order to be able to respond to the other's motion.

Actions to interpret and enforce contracts can be decided as a matter of law on a motion for summary judgment. *Enerco v. SOS Staffing Services, Inc.*, 2002 UT 78, 52 P.3d 1272 (summary judgment affirmed on appeal); *Bakowski v. Mountain States Steel, Inc.*, 2002 UT 62, 52 P.3d 1179 (same). "A trial Court may properly grant summary judgment when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *WebBank v. American General Annuity Service Corp.*, 2002 UT 88, ¶ 10, 54 P.3d 1139, 1143 (quoting Utah R. Civ. P. 56(c)). The interpretation of a contract is a question of law that is reviewed on appeal for correctness, without any deference to the decision of the trial court. *Id.*, ¶ 5, 1144.

"[T]he intentions of the parties are controlling . . . [and] **must be determined from the words of the agreement.**" *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) (emphasis added). Each provision of the contract is considered in relation to all other provisions "with a view toward giving effect to all and ignoring none." *WebBank*, 2002 UT 88, ¶ 18, 54 P.3d at 1145 (citations omitted). "If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement." *Enerco*, 2002 UT 78, ¶ 10, 52 P.3d 1272, 1274 (quoting *Winegar*).

Point 2: The duty to sufficiently maintain the surface of a railroad crossing for use by the traveling public is imposed by law only upon the owner or operator of the railroad tracks which cross the public thoroughfare.

In their action against UTA and SLCSR, the Goebels claimed UTA and SLCSR breached their alleged duty to Mr. Goebel (the cyclist) pursuant to three Utah statutes and a Salt Lake City Ordinance. The subject statutes and the ordinance are Utah Code §§ 10-7-26(2), 10-7-29, 56-1-11 and Salt Lake City Ordinance § 14.44.030. The complete statutes and the ordinance are set forth at Tabs 4-7 of the Addendum to this brief.

Utah Code § 10-7-26(2) requires companies that own or operate railroad tracks to keep the crossings where their tracks cross public thoroughfares "planked, paved, macadamized or otherwise in such condition for public travel as the governing body of the city or town may from time to time direct, keeping the plank, pavement or other surface of the street or alley level with the top of the rails of the track." It further provides that nothing contained in this section "shall be construed to exempt any **railway company** from keeping [its public crossings] in good and safe condition for public travel." (Emphasis added.)[7]

Section 10-7-29 in its portion relevant to the *Goebel* case required "railway companies" to keep their public crossings "safe in all respects for the use of the traveling public."

The duties imposed by these two statutes only are imposed upon companies that **own** or operate **railway tracks** on, along or across a public street or alley. Section 10-7-

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[7]There was no evidence in the *Goebel* case of any direction from Salt Lake City as to the condition of the subject crossing and subpart (2) of Section 10-7-26 was not at issue. However as noted in the text *infra*, subsection (1) of this statute is important in its definition of what is a "railway company."

26(1) provides the express definition of "railway company" for **both** Section 10-7-26(2) and Section 10-7-29. It states:

> (1) As used in this section and in Sections 10-7-28, **10-7-29**, 10-7-30, 10-7-31, 10-7-32 and10-7-33, the terms **"railway company"** or "street railway company" means any company which owns or operates railway **tracks** on, along or across a street or alley in any city or town. [Emphasis added.]

Section 51-1-11 only applies to railroad companies that own railroad tracks. It does not expressly state that non-owners who may control the use of the tracks (operators) are covered by its terms. In its entirety, Section 51-1-11 provides:

> Every railroad company shall be liable for damages caused by its neglect to maintain good and sufficient crossings at points where any line of travel crosses **its** road. [Emphasis added.]

Finally, Salt Lake Ordinance § 14.44.030 also only pertains to "their [railroad companys'] **tracks**" that are upon or across a city street. Whatever duties it imposes are upon the entity that owns the "rail**road**" not a railway company that merely operates trains over someone else's roadway.

Companies that own or operate trains may or may not own rail**roads** (tracks). The distinction between the owner or operator of the train and the owner or operator of the track must be recognized when discussing statutory duties imposed only upon the owner or operator of the tracks. Amtrak operates over UP's tracks in Utah but this does not impose a duty upon Amtrak to make or keep UP's crossings safe or sufficient for motorists, let alone bicyclists, pedestrians or roller bladers.

Point 3: Nothing in the subject Agreement delegates from UTA to SLCSR the duties owed by owners and operators of railroad tracks that cross public thoroughfares.

Had UTA and SLCSR not entered into the Agreement, there would be no question that UTA and only UTA owed any statutory duty to Mr. Goebel. UTA bought this entire right-of-way from UP, including the subject crossing. It thus became the owner and operator of the tracks at 1700 South and 250 West. At that time, the statutory duties to maintain safe, good or sufficient crossings at that place were only imposed upon UTA.

Nothing in the statutes or the ordinance relied upon by the Goebels suggest that the owner of the tracks can delegate the duty imposed upon it by those enactments so as to be free from its statutory and ordinance based responsibilities. Even had the Agreement provided that SLCSR assumed **all** of UTA's statutory and ordinance based duties, Goebels still could have sued UTA if UTA's crossing was not "good and sufficient."

It is UTA's position that it was sued only because it was the owner of the crossing and that its statutory and ordinance based duty to maintain the crossing surface for bicyclists had been contractually transferred completely by the Agreement to SLCSR. Since UTA alleges that its legal duty was contracted out to SLCSR, UTA claims it is owed indemnity. UTA avers that it was the "intent" of the parties that all of UTA's crossing maintenance, repair and if necessary upgrade duties were to be performed by SLCSR until UTA began operating its TRAX trains. The Agreement could have said this, but it does not.

No portion of the subject right of way was sold, leased or otherwise transferred to SLCSR by UP or UTA. SLCSR did not become the operator of any of UTA's tracks. SLCSR merely received a license, designated to be an easement, to use particular tracks

as designated by UTA at times designated by UTA for only one limited purpose – freight rail service.

SLCSR is specifically barred by the Agreement from doing anything not necessary for "Freight Rail Service." Section 2.1 states, in pertinent part, that SLCSR "shall have no right or obligation to conduct, and **shall not conduct**, directly or indirectly, . . . **any** other **activity whatsoever** on the Right-of-Way **that is not necessary to Freight Rail Service**." (Emphasis added.) No claim has been made, and no claim could honestly be made, that replacing pads at a crossing to eliminate gaps for the benefit of bicyclists is necessary to provide service to freight customers.

The section of the Agreement that delineates SLCSR's crossing maintenance obligation on Joint Trackage is Section 3.3. In its entirety it provides as follows:

> 3.3 Subject to Sections 3.4 and 10.2, [SLCSR] shall be responsible for and shall pay the costs of the maintenance, repair and renewal of the Joint Trackage and shall maintain, repair and renew the same to the standards it deems necessary for Freight Rail Service; provided that [SLCSR] shall, at a minimum, maintain, repair and renew the Joint Trackage so as to preserve the present condition of track, grade crossings and signal facilities, as described on Exhibit "B" hereto. Nothing herein shall relieve [SLCSR] of the obligation to perform maintenance, repair and renewal of the Joint Trackage in a good and workman-like manner and in compliance with all applicable laws and regulations.

It is clear that the only **non-discretionary** maintenance obligation for Joint Trackage imposed upon SLCSR by the Agreement is the "minimum" obligation of Section 3.3. SLCSR is only required to maintain the crossings on the tracks it used to the condition they were in before SLCSR started operating over them. Agreement, § 3.3. *See also* § 3.1. In other words, SLCSR only agreed to fix any deterioration and damage to

these crossings that was caused by its operations. SLCSR also had the **right** to provide a higher level of maintenance on the tracks it used but only if such higher level of maintenance was **deemed by SLCSR** to be "**necessary** for Freight Rail Service." Agreement, §§ 3.1 and 3.3 (emphasis added). If SLCSR determined that modifications to a crossing were reasonably necessary to accommodate its freight rail service, it could not make those modifications without UTA's approval. "SLCSR **shall not** commence construction **or other work** in connection with such Modifications . . . without first entering into a Modification Agreement with UTA and **obtaining UTA's written consent**." *Id.*, § 4.1 (emphasis added). If such modifications were made they "shall become the property of UTA." *Id.*

This contractual language clearly does not express an intent of the parties that SLCSR was accepting all of UTA's statutory owner-based responsibilities to the traveling public until TRAX became operational as contended by UTA in the court below. Indeed, this language doesn't transfer **any** of UTA's statutory obligations to maintain good and sufficient crossings for the public for **any** period of time.

Had the parties intended that SLCSR assume all of the legal responsibilities that UTA owed the traveling public, all they had to do was state that SLCSR would perform "all maintenance, repair and renewal needed on the subject right-of-way until TRAX began operations." The contract does not so provide. UTA can point to nothing in the actual language of the Agreement to support its claim that the parties intended SLCSR to perform **all** maintenance and improvements until TRAX began operations.

The parties clearly did provide that once TRAX became operational "all" maintenance on the tracks jointly used by both UTA and SLCSR would be done by UTA. *See* Agreement, § 3.4. Section 3.3 is made expressly subject to Section 3.4. Section 3.4 demonstrates both that the parties knew how to use the word "all" and that the parties clearly intended SLCSR's duty and right to do maintenance on tracks it used to be different and more limited than UTA's legal duties and rights.[8]

The conclusion that UTA did not transfer its maintenance duties and rights to SLCSR is supported by other provisions of the Agreement. UTA jealously made sure that it retained the operational control of its newly acquired railroad right-of-way. For example, the Agreement differentiates "Passenger Trackage" from other trackage. SLCSR "shall have no right . . . to conduct, and shall not conduct, directly or indirectly, Freight Rail Service on the Passenger Trackage . . .." Agreement, § 2.1. Section 5.1 of the Agreement reiterates this prohibition. "Southern shall not have any right to operate on

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[8]The fact that the parties could have but did not transfer "all" of UTA's crossing obligations and duties to SLCSR is further highlighted by the fact that the parties did use the word "all" in discussing SLCSR's duties with respect to "Freight Trackage." As for "Freight Trackage," the Agreement reads, "[SLCSR] shall bear **all** costs and expenses of maintenance, repair and renewal of the Freight Trackage." Agreement, § 3.1 (emphasis added). This sentence was left out of the section pertaining to "Joint Trackage" that is at issue in this case. *Id.*, § 3.3. After Mr. Goebel's accident, and after UTA began its TRAX operations, UTA and SLCSR entered into an Amended Administration And Coordination Agreement, dated October 18, 1999, that also used the word "all." R. 426-54. "Freight Operator [SLCSR] shall bear **all** costs and expenses of maintenance, repair and renewal of the Freight Trackage." R. 433-34 (§ 3.1) (emphasis added). Following December 4, 1999, UTA retained all responsibility to maintain, repair and renew its Passenger Trackage and Joint Trackage, except that SLCSR still agreed to repair any Joint Trackage damaged only by its own freight operations thereon. R. 434 (§§ 3.2 and 3.3).

the Passenger Trackage." SLCSR was prohibited from operating passenger service on any part of UTA's property. *Id.*, § 2.2. SLCSR had the authority to operate on "Freight Trackage." *Id.*, § 5.2. It also has limited authority to operate freight service on "Joint Trackage." *Id.*, §§ 5.3 *et seq.* UTA, however, designated which track was Freight Trackage, Passenger Trackage or Joint Trackage and, subject to not unreasonably interfering with freight service, UTA retained the right to change those designations. *Id.*, § 2.3. UTA also has the right to realign the Freight Trackage, Passenger Trackage or Joint Trackage so long as it does not unreasonably interfere with freight rail service. *Id.*, § 4.3. The parties agreed that SLCSR's use of Freight or Joint Trackage would be limited to "12:00 midnight and 5:00 a.m., Monday through Friday." *Id.*, § 5.4. From 5:01 a.m. to 11:59 p.m. Monday through Friday and all day on Saturday and Sunday, UTA alone had the right to "manage, direct and control . . . all activities on the Joint Trackage," that is at issue in this case, "and shall direct dispatching and control the entry and exit of all trains, locomotives, rail cars and rail equipment and the movement and speed of the same on the Joint Trackage." *Id.*, § 5.7. In addition, SLCSR is to pay "taxes, assessments, fees, charges, costs and expenses related **solely to Freight Rail Service** . . .."[9] **UTA** is to pay all other taxes, assessments, fees, charges, costs and expenses related to the **ownership** of the Right-of-Way. *Id.*, § 5.8 (emphasis added).

Thus, it is clear that SLCSR has limited obligations pertaining to its limited rights, and that UTA retained all other maintenance obligations as well as control over its tracks,

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[9]If its easement was separately assessed, it also had to pay those taxes.

particularly its "Joint Trackage."

The issue in this case is whether SLCSR's limited obligations under the Agreement included the duty to maintain UTA's crossing surfaces on Joint Trackage to be gap free for the safety of bicyclists.[10] Nothing in the Agreement transfers to SLCSR UTA's legal obligation to maintain its crossing surfaces for the safety of the public, including bicyclists. At most, SLCSR agreed to do maintenance, only on specific trackage used by SLCSR and designated by UTA, necessary to keep that property in the same condition it was in before SLCSR started to use it and other maintenance only if deemed **necessary by SLCSR for freight rail service**, with any modifications for that purpose being subject to UTA approval. SLCSR was expressly denied the right to do anything else. This limited duty is clearly stated in sections 2.1, 3.3 and 4.1 of the Agreement. Section 3.3, set forth above, must be read in the context of sections 2.1 and 4.1 which read:

> 2.1 Pursuant to the terms and conditions of the Easement Agreement, [SLCSR] shall have the exclusive right and obligation to provide Freight Rail Service on the Freight Trackage and the Joint Trackage. **[SLCSR] shall have no right or obligation to conduct, and shall not conduct, directly or indirectly,** Freight Rail Service on the Passenger Trackage or **any other activity whatsoever on the Right-of-Way that is not necessary to Freight Rail Service**. UTA shall have no right or obligation to conduct, and shall not conduct, directly or indirectly, Freight Rail Service on the Right-of-Way.
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> 4.1 **If [SLCSR] reasonably determines that Modifications are required to accommodate its Freight Rail Service over the Freight Trackage or the Joint Trackage, [SLCSR] shall bear all expenses in connection with**

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[10]UTA acknowledges that the Agreement "governs the parties' respective duties and obligations to maintain." R. 4 (¶ 12). UTA also acknowledges the the subject crossing was on "Joint Trackage." R. 5 (¶ 17).

> **such Modifications**, including without limitation the annual expense (for so long as such Modifications are a part of the Freight Trackage or the Joint Trackage) of maintaining, repairing, inspecting, and renewing such Modifications, including any increased operating costs associated with passenger Service. **[SLCSR] shall not commence construction or other work in connection with such Modifications to the Joint Trackage or the Freight Trackage without entering into a Modification Agreement with UTA and obtaining UTA's written consent.** The parties shall, through the Coordination Committee, negotiate in good faith to enter into a Modification Agreement for [SLCSR]'s Modifications to the Joint Trackage or the Freight Trackage **necessary for Freight Rail Service**, but such Modifications shall not interfere with or impede Passenger Service over the Right-of-Way. **All Modifications made by [SLCSR] to the Freight Trackage or the Joint Trackage within the Right-of-Way shall become the property of UTA.**

In contrast, if SLCSR had a broader duty to do **all** maintenance, including the elimination of gaps in the crossing surface material for the safety of the bicycling public, the parties easily could have used the word "all" in describing the scope of SLCSR's maintenance obligations, as they did in sections 3.2 and 3.4 when referring to UTA's broader maintenance obligations. *See also* Agreement, § 3.1 (the parties used the word "all" in describing SLCSR's duties with respect to "Freight Trackage" but did not do so with respect to "Joint Trackage").[11]

UTA unambiguously limited SLCSR's maintenance obligations to match SLCSR's limited right to provide freight rail service over certain designated portions of UTA's property. If SLCSR's freight operations damage or wear out UTA's property, SLCSR is to return UTA's property to the condition that existed at the time SLCSR began its operations. If, in its sole discretion, SLCSR deemed additional maintenance necessary for freight operations, SLCSR is to do that maintenance as well. However, if modifications,

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[11] *See supra* note 8.

including improvements, are required, UTA retained control over whether to approve such changes. SLCSR had no obligation and indeed no right under the contract to do more than the minimum, basic maintenance needed for SLCSR to operate freight trains over UTA's property designated as Joint Trackage, without diminishing UTA's ability to use, and modify, its property as needed for TRAX operations.

UTA was capable of complying with its broader legal maintenance obligations. In fact, for its own purposes UTA ultimately replaced the rubber pads at the subject crossing, and other crossings, with concrete panels. The parties knew before the accident that UTA would be refurbishing its crossing surfaces. If SLCSR contracted to assume the same obligations to the public owed by UTA, as the owner and controller of its property, SLCSR would have been required to second guess UTA's decisions as to when to begin the improvement project and the sequence of the crossing upgrades. SLCSR had no right, let alone a contractual obligation, to tell UTA to replace the 1700 South crossing before replacing the 2100 South crossing, or vice versa. Similarly, SLCSR cannot be found to have agreed to second guess UTA as to whether the design and installation of the new crossings with concrete panels complies with the legal obligations imposed upon UTA to the bicycling public.

Point 4: Since SLCSR did not contractually assume the legal obligations owed by UTA to the traveling public, UTA is not entitled to indemnity for UTA's defense of the Goebels' action.

The specific indemnity language of the Agreement at issue reads as follows:

> 7.1 Both parties shall undertake to comply with all applicable federal, state and local laws and regulations, and all applicable rules, regulations or orders

promulgated by any court, agency, municipality, board or commission. If any failure of either party to comply with such laws, rules, regulations or orders in respect to the use of the Right-of-Way results in any fine, penalty, cost or charge being assessed against the other party, or any Loss or Damage, the party which failed to comply agrees to reimburse promptly and indemnify, protect, defend and hold harmless the other Party for such amount.

7.2 Notwithstanding (i) anything else contained in this Coordination Agreement or (ii) otherwise applicable law regarding allocation of liability based on fault or otherwise, as between the parties hereto liability for Loss or Damage resulting from or in connection with the maintenance, construction, operations or other acts or omissions of either party shall be borne and paid by the parties as follows:

(a) When such Loss or Damage results from or arises in connection with **maintenance**, construction, operations or other **acts or omissions of only one of the parties**, regardless of any third party involvement, **such Loss or Damage shall be borne by that party**;

(b) When such Loss or Damage results from or arises in connection with the act or omissions of **both parties**, or of third parties, or from unknown causes, Acts of God, or any other causes whatsoever, **such liability shall be borne by the party or parties responsible under applicable law**.

7.3 Each party agrees that it **will pay for all Loss or Damage** the risk of which it has herein assumed, the judgment of any court to the contrary and otherwise applicable law regarding liability notwithstanding, **and will forever indemnify, protect, defend and hold harmless the other party**, its successors and assigns, **from such payment**.

"Loss or Damage" shall mean **all** costs, liabilities, judgments, fines, fees, (including without limitation reasonable attorneys' fee and disbursements) and expenses (including without limitation defense expenses) of any nature arising from or in connection with death of or injury to persons . . ..

The intent of UTA and SLCSR is unequivocally stated in these provisions to impose the responsibility to indemnify for "Loss or Damage" only when the "Loss or Damage results from or arises in connection with maintenance . . . acts or omissions of **only one** of the parties." This is expressly stated to be the intent regardless of third party

involvement, anything else stated in the Agreement, otherwise applicable law regarding liability or allocation of liability, or the judgment of any court to the contrary. The intent of the parties is expressly stated to include within this duty to indemnify, protect, defend and hold harmless, as stated in the definition of "Loss or Damage," the payment of "all costs, liabilities, judgments, fines, fees (including without limitation reasonable attorneys' fees and disbursements) and expenses (including without limitation defense expenses) of any nature arising from or in connection with . . . injury to persons."

As between the parties to this Agreement, UTA alone, as owner and controller of its **railroad**, owed the duty imposed by law, including Utah Code § 51-1-11, to "maintain good and sufficient crossings at points where any line of travel crosses **its road**." (Emphasis added.) Nothing in the Agreement transfers this statutory duty from UTA to SLCSR. All the Agreement imposes onto SLCSR is the limited duty to maintain UTA's **railroad** to the extent that it wears out or is damaged because of SLCSR's use of it for freight service. UTA's legal duty to improve its property, if necessary, for the safety of bicyclists is not transferred to SLCSR. Contractually, only UTA had that particular duty which is the only relevant duty raised in the Goebels' action.

Since indemnity is allowed only when one of the parties breached a contractual duty it alone had to a third party, and UTA alone had the contractual duty to improve its crossing surfaces if necessary to be safe for bicyclists, the Agreement allows indemnity only in favor of SLCSR. UTA cannot be entitled to indemnity because the particular duty Goebels alleged to be breached could only have been owed, under the Agreement, by

UTA.

Point 5: The *Goebel* decision doesn't transfer UTA's duties onto SLCSR.

The *Goebel* court only held that SLCSR's actual freight service operations demonstrated enough control over UTA's **railroad** to fall within the language of the statutory duties of railroad operators to third party travelers, like Mr. Goebel. The *Goebel* court relied upon the specific facts presented concerning SLCSR's operations to find sufficient control over the tracks so as to deem SLCSR an operator of those tracks. *Goebel*, ¶ 16. The only reference by the *Goebel* court to a specific provision of the Agreement was to Section 5.2. If the *Goebel* decision is dependent upon the court's reliance upon that Section, the decision is highly suspect. The *Goebel* court seemed to support its decision with the belief that SLCSR had the exclusive right to "operate" UTA's property. That conclusion is not correct. SLCSR only had the exclusive right to operate freight trains over some of UTA's property as designated and controlled by UTA. The *Goebel* court relied only upon section 5.2, a section of the Agreement pertaining to "Freight Trackage" when "Joint Trackage" was at issue.[12] UTA retained control over its property, including limiting SLCSR's use of Joint Trackage. Agreement, §§ 2.1, 2.3, 4.3, 5.1, 5.3 *et seq.* Nevertheless, even assuming that SLCSR's actual operations were sufficient to make it an operator of the tracks, the *Goebel* court's ruling that such operations imposed statutory duties onto SLCSR with respect to the Goebels does not control this Court's interpretation of the Agreement between SLCSR and UTA.

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[12] *See supra* note 3.

It is the language of the Agreement that determines the rights between SLCSR and UTA. Even if SLCSR owed legal duties to the Goebels, pursuant to the *Goebel* ruling, this Court must look to the Agreement to determine if UTA and SLCSR intended to transfer UTA's legal duties to SLCSR so that UTA would be contractually free from those duties. The *Goebel* ruling does not prevent this Court from acknowledging UTA's legal duties and finding that the Agreement no where attempts to transfer those duties to SLCSR.

Moreover, the *Goebel* ruling does not prevent this Court from applying, in the context of the instant dispute, section 7.3 of the Agreement. That particular section pertaining to indemnity requires this Court to ignore the *Goebel* ruling. It states, "Each party agrees that it will pay for all Loss or Damage the risk of which it has herein assumed, the judgment of any court to the contrary and otherwise applicable law regarding liability notwithstanding." It does not matter whether SLCSR owed tort duties, or statutory duties, to the Goebels or whether the *Goebel* court so held, the important point is that UTA clearly owed those duties as the owner (and operator) of its property and the parties' Agreement was that UTA alone assumed the risk of any breach of those particular duties. Nowhere in the Agreement did SLCSR assume the risk of failing to improve crossing surfaces to be safe for bicyclists.

The *Goebel* decision has no affect on SLCSR's right to indemnity from UTA because, as between UTA and SLCSR, UTA alone had the contractual duty to improve its crossings for the safety of bicyclists, an activity of third parties unrelated to SLCSR's

freight service activities.

Point 6: If *Goebel* does control then both SLCSR and UTA had the alleged duty toward bicyclists and no indemnity is allowed under the Agreement.

If this Court does not follow section 7.3, and instead applies statutory law as construed by the *Goebel* court pertaining to the duty of those who own and control **railroads** to conclude that SLCSR had the contractual duty to improve UTA's crossing to be reasonably safe for bicyclists, then both SLCSR and UTA would have had that same duty. If statutory law is applied to find SLCSR owed a duty to the Goebels under the Agreement, statutory law also will have to be applied to conclude that UTA also owed a duty to the Goebels under the Agreement. Thus, if the *Goebel* ruling controls in this case, both SLCSR and UTA had a duty to improve UTA's crossings to be reasonably safe for bicyclists, and both were potentially liable to the Goebels for failing to remove and replace the rubber panels to eliminate the alleged gap sooner than UTA did so. This fact would prevent a ruling in favor of UTA.

Section 7.1 of the Agreement provides, with respect to indemnity obligations, that both parties agree to comply with all laws. "If any failure of either party to comply with such laws . . . results in . . . any Loss or Damage, the party [singular] which failed to comply agrees to reimburse promptly and indemnify the other Party for such amount." If SLCSR and UTA both failed to comply with the same law, neither is entitled to indemnity by the terms of this section.

Likewise, construing section 7.1 with section 7.2(a) and (b) also reveals that in the

case where both SLCSR and UTA failed to comply with the law and caused damage to the other, neither is entitled to indemnity. Section 7.2 expressly states that its provisions apply notwithstanding "anything else contained in this Coordination Agreement." Section 7.2(a) expressly pertains to the acts and omissions "of only one of the parties." Section 7.2(b) states, "When such Loss and Damage results from or arises in connection with the acts or omissions of **both** parties . . . such liability shall be borne by the party or parties responsible under applicable law." Thus, since UTA's damages arising from Goebels' allegations of the parties' joint failure to improve the subject crossing surface to be free of gaps is the result of not only SLCSR's but also UTA's own failure to improve that crossing sooner than it did, UTA's alleged liability to the Goebels is borne by UTA alone under applicable law. The Agreement expressly forbids UTA from shifting its alleged liability onto SLCSR. The remaining indemnity provisions become inapplicable.

Finally, the fact that the Goebels' claim was found as a matter of law to be without merit could preclude indemnity to either party to the Agreement. As a matter of law, the duty to provide a good and sufficient crossing for the benefit of Mr. Goebel was not breached, regardless of whether UTA, SLCSR or both of them owed that duty. *Goebel*, ¶ 28.

As noted above, the Agreement has two indemnity provisions, Section 7.1 and Section 7.3. Section 7.1 seems clearly inapplicable given the ruling in *Goebel*. It provides for indemnity only when there is "any failure of either party to comply with such laws, rules, regulations or orders in respect to the use of the Right of Way. . . ."

Agreement, § 7.1 (for the complete language of this Section see Tab 1 at page 17). Although Goebels alleged violations by both parties of three statutes and one ordinance, those allegations were found to be without merit as a matter of law. Section 7.1, although it does contain a duty to defend, appears to impose indemnity and a duty to defend only for Loss or Damage caused by actual violations of law.

Section 7.3 is a little more complicated. It provides that each party will indemnify and defend the other from Loss or Damage "the risk of which [one party and not the other] has herein assumed." Agreement, § 7.3 (for the complete provision see Tab 1 at page 16). In this case, the only relevant "assumed risk" would be that found in Section 7.2(a). This section provides as follows:

> (a) When such Loss or Damage **results from or arises in connection with** the maintenance, construction, operations or other acts or omissions of only one of the parties, regardless of any third party involvement, such Loss or Damage shall be borne by that party; . . ..

As a matter of law, Mr. Goebel's claim and the Loss or Damage it caused both UTA and SLCSR did not "result from" any actual "maintenance," "operations" or "acts or omissions" of either party to the Agreement. The result of the *Goebel* case exonerates the acts and omissions of both parties. The question thus becomes whether the language "arises in connection with" imposes a duty to defend against a meritless claim. If this Court determines that language is insufficient to impose such a duty, then neither UTA nor SLCSR is entitled to indemnity for the other's failure to defend.

CONCLUSION

UTA agreed to indemnify and hold harmless SLCSR for UTA's failure to comply

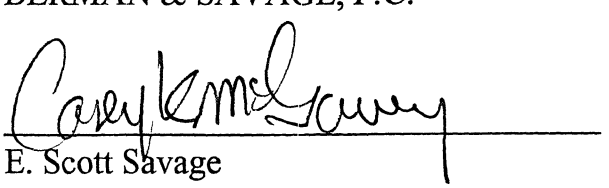
with its legal duties. UTA had the sole obligation, as the property owner, to maintain and improve crossing surfaces along its right-of-way for all purposes except for what SLCSR agreed to maintain. SLCSR never agreed to improve any crossing surfaces for the safety of bicyclists. UTA should be held liable to indemnify SLCSR from the Goebels' claim that the subject crossing was not improved by SLCSR for Mr. Goebel's safety. Therefore, this Court should hold that UTA is obligated to indemnify SLCSR for its expenses in defending against the Goebels' claim and remand this case for the limited purpose of determining the amount of those expenses.

Alternatively, if despite the Agreement, SLCSR is found to have a legal duty to improve UTA's crossings for bicyclists, then that duty was owed by both parties. In that case, neither party should be held to have a contractual duty to indemnify the other.

SLCSR, therefore, respectfully requests that the judgment for UTA be reversed and that this action be remanded to the trial court with directions for the entry of judgment in favor of SLCSR and against UTA and for a determination of SLCSR's damages. Alternatively, the judgment in favor of UTA should be reversed and neither party awarded indemnity.

DATED this 3rd day of June, 2005

BERMAN & SAVAGE, P.C.

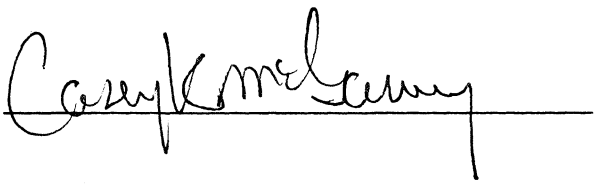


E. Scott Savage
Casey K. McGarvey
Attorneys for Salt Lake City Southern Railroad Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2005, I caused true and correct copies of the within and foregoing **BRIEF OF APPELLANT SALT LAKE CITY SOUTHERN RAILROAD COMPANY, INC.** to be mailed, postage prepaid, to the following:

Alan L. Sullivan
Todd Shaughnessy
Angela Stander
Snell & Wilmer
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004



ADDENDUM

lab 1

ADMINISTRATION AND COORDINATION AGREEMENT

This ADMINISTRATION AND COORDINATION AGREEMENT (the "Coordination Agreement") is made as of the 31st day of March, 1993, between Salt Lake City Southern Railroad Co., Inc., a Texas corporation ("SLS") and Utah Transit Authority, a public transit district organized under Title 17A, Chapter 2, Part 10, Utah Code Annotated 1953, as amended ("UTA").

WITNESSETH:

WHEREAS, pursuant to the Purchase and Sale Agreement between Union Pacific Railroad Company ("UPRR") and UTA, dated as of October 30, 1992 (the "Purchase Agreement"), UPRR has conveyed to UTA as of the date of this Coordination Agreement certain right-of-way, trackage and other assets and improvements located on UPRR's Provo Subdivision Line, and on UPRR's Lovendahl Spur also known as the Midvale Lead, (more fully described and defined below as the "Right-of-Way") excluding a freight railroad operating easement which was retained by UPRR;

WHEREAS, pursuant to a freight railroad operating easement and an assignment agreement between UPRR and SLS, dated as of March 31, 1993 (the "Easement Agreement"), UPRR has conveyed to SLS as of the date of this Coordination Agreement a freight railroad operating easement on the Right-of-Way (defined below as the "Freight Easement") in order to enable SLS to provide common carrier rail freight operations on the Right-of-Way;

WHEREAS, the parties hereto (UTA and SLS) will be sharing usage of the Right-of-Way under terms and conditions set forth below; and

WHEREAS, the parties desire to clarify and establish their respective rights and obligations with respect to SLS's common carrier rail freight operations on the Right-of-Way and UTA's construction of additional trackage and provision of passenger service on the Right-of-Way.

NOW, THEREFORE, in consideration of the premises, reservations, covenants and undertakings contained herein, SLS and UTA covenant and agree as follows:

SECTION 1. DEFINITIONS

The following terms and phrases shall be defined as follows for the purposes of this Coordination Agreement:

"Closing Date" shall have the meaning ascribed in the Purchase Agreement, which is the date the sale of assets from UPRR to UTA is closed and which closing is to take place, if practical by December 31, 1992, but not later than June 1, 1993.

"Coordination Agreement" shall mean this Administration and Coordination Agreement.

"Easement Agreement" shall mean that certain freight railroad operating easement and the assignment agreement, concerning rights and obligations to provide Freight Rail Service, by and between UPRR and SLS and dated as of March 31, 1993.

"Freight Easement" shall mean the easement acquired by SLS for common carrier rail freight operations on the Right-of-Way pursuant to the terms of the Easement Agreement.

"Freight Preference Period" shall have the meaning ascribed in Section 5.4 hereof.

"Freight Rail Service" shall mean the common carrier rail freight operations to be conducted by SLS on the Right-of-Way.

"Freight Trackage" shall mean any Joint Trackage and/or Passenger Trackage, which is designated by UTA to be Freight Trackage pursuant to Section 2.3 hereof, or any additions to the existing trackage constructed by SLS on the Right-of-Way after the Closing Date pursuant to Section 4.1 hereof.

"Joint Trackage" shall mean the trackage affixed to the Right-of-Way as of the Closing Date that was included in the Freight Easement, (described in Exhibit "A" hereto) unless such trackage is redesignated pursuant to Section 2.3 hereof, or any Freight Trackage or Passenger Trackage designated by UTA to be Joint Trackage pursuant to Section 2.3 hereof.

"Loss or Damage" shall mean all costs, liabilities, judgments, fines, fees (including without limitation reasonable attorneys' fees and disbursements) and expenses (including without limitation defense expenses) of any nature arising from or in connection with death of or injury to persons, including without limitation employees of the parties; or damage to or destruction of property, including the Joint Trackage, the Freight Trackage, the Passenger Trackage or any property on the Right-of-Way, in connection with Freight Rail Service or Passenger Service on the Right-of-Way; or business losses resulting from or in connection with an act or omission giving rise to a claim for Loss or Damage.

"Modification Agreement" shall mean a written agreement between the parties hereto entered into in anticipation of a Modification.

"Modification" or "Modifications" shall mean alterations or additions to, or removal of, then-existing trackage on the Right-of-Way, including but not limited to new connections, and changes in railroad communication systems, signal or dispatching facilities.

"Passenger Preference Period" shall have the meaning ascribed in Section 5.4 hereof.

"Passenger Service" shall mean the transportation of passengers on all or any portion of the Right-of-Way, which shall be provided by UTA or its designee.

"Passenger Trackage" shall mean all segments of trackage constructed by UTA on the Right-of-Way after the Closing Date pursuant to Section 4.2 or 4.4 hereof, or any Freight Trackage or Joint Trackage hereafter designated by UTA to be Passenger Trackage pursuant to Section 2.3 hereof.

"Purchase Agreement" shall mean that certain Purchase and Sale Agreement by and between UTA and UPRR, dated as of October 30, 1992.

"Right-of-Way" shall mean the following described portions of the property interests conveyed by UPRR to UTA pursuant to the terms and conditions of the Purchase Agreement: all right-of-way, trackage, and structures included in or adjacent to the property described in Parcels No. 1 and 2 of Exhibit "A" to the Purchase Agreement, including all real property shown and described in the Maps and other documents regarding the right-of-way which were included in Exhibit "A" to the Purchase Agreement, and all fixtures, tracks, rails, ties, switches, crossings, tunnels, bridges, trestles, culverts, buildings, structures, facilities, leads, spurs, turnouts, tails, sidings, team tracks, signals, crossing protection devices, railroad communications systems, poles and all other operating appurtenances that are situated: (1) on or

adjacent to the trackage formerly constituting part of UPRR's Provo Subdivision Line from the Salt Lake County/Utah County boundary line (approximately UPRR milepost 775.19) to Ninth Street Junction (which is on the North side of 900 (NINTH) South Street in Salt Lake City at approximately UPRR milepost 798.74); and (2) on or adjacent to the trackage formerly constituting UPRR's Lovendahl Spur, also known as the Midvale Lead, which departs from the trackage referenced above in a southwesterly direction at approximately 6400 (SIXTY-FOUR HUNDRED) South Street in Murray, Utah (approximately former UPRR milepost 790.52), crossing under both I-15 and the Denver and Rio Grande Western Railroad Company ("D&RGW") main line, and then heading south to approximately 7400 South, to the point of intersection with the D&RGW right of way, a distance of approximately 1.4 miles.

"SLS" shall mean Salt Lake City Southern Railroad Co., Inc., a Texas corporation and the Freight Railroad Successor under the Purchase Agreement.

"UTA" shall mean Utah Transit Authority, a public transit district organized under Title 17A, Chapter 2, Part 10, Utah Code Annotated 1953, and its successors or assigns.

SECTION 2. FREIGHT RAIL SERVICE; PASSENGER SERVICE

2.1 Pursuant to the terms and conditions of the Easement Agreement, SLS shall have the exclusive right and obligation to

provide Freight Rail Service on the Freight Trackage and the Joint Trackage. SLS shall have no right or obligation to conduct, and shall not conduct, directly or indirectly, Freight Rail Service on the Passenger Trackage or any other activity whatsoever on the Right-of-Way that is not necessary to Freight Rail Service. UTA shall have no right or obligation to conduct, and shall not conduct, directly or indirectly, Freight Rail Service on the Right-of-Way.

2.2 UTA shall have the exclusive right to conduct, by itself or through UTA's designee or otherwise, Passenger Service on the Right-of-Way. SLS shall have no right or obligation to conduct, and shall not conduct, directly or indirectly, Passenger Service on the Right-of-Way; provided, however, that UTA and SLS may arrange, under a separate written agreement, for SLS to perform certain services on behalf of UTA with respect to the Passenger Service.

2.3 UTA may from time to time, upon 30 days written notice to SLS, change any track designation (Freight Trackage, Passenger Trackage or Joint Trackage) to any other track designation; provided, however that no such change in track designation shall unreasonably interfere with SLS's Freight Rail Service on the Right-of-Way; provided, further, that the parties may agree to immediate track redesignations to respond to emergencies or the needs of the parties. UTA may not designate trackage as Freight Trackage without the written consent of SLS if such trackage is (1)

then being used for Passenger Service, or (2) then not being used for Freight Rail Service. In order to ensure safe, economical and reliable Freight Rail Service and Passenger Service on the Right-of-Way, the parties shall establish a Coordination Committee. The Coordination Committee will convene to resolve those administrative and coordination matters designated for Coordination Committee resolution by the terms of this Coordination Agreement as well as any other matters, upon agreement of the parties. The Coordination Committee shall be composed of two representatives from each party. The chief executive officer of each of SLS and UTA also shall be ex officio members of the Coordination Committee.

SECTION 3. MAINTENANCE; ALTERATIONS

3.1 SLS shall be responsible for the maintenance, repair and renewal of the Freight Trackage and shall maintain, repair and renew the same to the standards it deems necessary for Freight Rail Service; provided that SLS shall, at a minimum, maintain, repair and renew the Freight Trackage so as to preserve the present condition of track, grade crossings and signal facilities, as described on Exhibit "B" hereto. SLS shall bear all costs and expenses of maintenance, repair and renewal of the Freight Trackage. Nothing herein shall relieve SLS of the obligation to perform maintenance, repair and renewal on the Freight Trackage in a good and workman-like manner and in compliance with all applicable laws and regulations.

3.2 UTA shall be responsible for the maintenance, repair and renewal of the Passenger Trackage and shall maintain, repair and renew the same to the standards it deems necessary for Passenger Service; UTA shall bear all costs and expenses of maintenance, repair and renewal of the Passenger Trackage.

3.3 Subject to Sections 3.4 and 10.2, SLS shall be responsible for and shall pay the costs of the maintenance, repair and renewal of the Joint Trackage and shall maintain, repair and renew the same to the standards it deems necessary for Freight Rail Service; provided that SLS shall, at a minimum, maintain, repair and renew the Joint Trackage so as to preserve the present condition of track, grade crossings and signal facilities, as described on Exhibit "B" hereto. Nothing herein shall relieve SLS of the obligation to perform maintenance, repair and renewal on the Joint Trackage in a good and workman-like manner and in compliance with all applicable laws and regulations.

3.4 Upon written notice to SLS at any time, but at least sixty (60) days prior to commencement of Passenger Service, UTA shall undertake and assume all costs of maintenance, repair and renewal of the Joint Trackage. Upon assumption of maintenance, repair and renewal of the Joint Trackage, UTA shall maintain, repair and renew the Joint Trackage to the standards it deems necessary for Passenger Service; provided that UTA shall, at a minimum, maintain, repair and renew the Joint Trackage so as to preserve the track to FRA Class I track and grade crossings and

signal facilities to their then current condition. SLS hereby acknowledges that the present condition of track and signal facilities is sufficient for its Freight Rail Service. If UTA fails to maintain, repair and renew the Joint Trackage in accordance with the standard set forth above, SLS shall have the right to maintain, repair and renew the Joint Trackage to the standard necessary to fulfill its rail carrier obligations.

SECTION 4. CONSTRUCTION; MODIFICATIONS

4.1 If SLS reasonably determines that Modifications are required to accommodate its Freight Rail Service over the Freight Trackage or the Joint Trackage, SLS shall bear all expenses in connection with such Modifications, including without limitation the annual expense (for so long as such Modifications are a part of the Freight Trackage or the Joint Trackage) of maintaining, repairing, inspecting, and renewing such Modifications, including any increased operating costs associated with Passenger Service. SLS shall not commence construction or other work in connection with such Modifications to the Joint Trackage or the Freight Trackage without entering into a Modification Agreement with UTA and obtaining UTA's written consent. The parties shall, through the Coordination Committee, negotiate in good faith to enter into a Modification Agreement for SLS's Modifications to the Joint Trackage or the Freight Trackage necessary for Freight Rail Service, but such Modifications shall not interfere with or impede Passenger Service over the Right-of-Way. All Modifications made by

SLS to the Freight Trackage or the Joint Trackage within the Right-of-Way shall become the property of UTA.

4.2 UTA plans to construct additional trackage (which, in the absence of some other designation, shall initially be deemed to be Passenger Trackage) on the Right-of-Way so that, through usage of existing and such additional trackage, the Right-of-Way may accommodate Freight Rail Service and Passenger Service. UTA shall have the right to construct such additional trackage as it deems necessary; provided, however, that no such construction shall unreasonably interfere with SLS's Freight Rail Service on the Right-of-Way but that SLS shall reasonably cooperate with UTA so as to allow for the construction of additional trackage on the Right-of-Way. UTA and SLS, through the Coordination Committee, shall cooperate to secure (from a third party independent contractor) temporary substitute service during construction or modification periods; the cost of substitute service to freight customers during construction or modification periods shall not be borne by SLS. UTA shall be responsible for the construction of additional trackage for Passenger Service on the Right-of-Way and shall construct the same to the standards it deems necessary for Passenger Service; UTA shall bear all costs and expenses of construction of such additional trackage.

4.3 UTA shall have the right, upon 30 days written notice to SLS, to realign the Freight Trackage, the Passenger Trackage or the Joint Trackage on the Right-of-Way; provided, however, that no such

realignment shall unreasonably interfere with SLS's Freight Rail Service but that SLS shall reasonably cooperate with UTA so as to allow for such realignment.

4.4 If UTA determines that Modifications to the Joint Trackage or the Passenger Trackage (after construction) are required to accommodate its Passenger Service over the Joint Trackage or the Passenger Trackage, UTA shall bear all expenses in connection with construction of additional, bettered, or altered facilities, including without limitation the annual expense (for so long as such additional, bettered, or altered facilities are a part of the Joint Trackage or the Passenger Trackage) of maintaining, repairing, inspecting, and renewing such additional or altered facilities. All additions, alterations and improvements made by UTA to the Joint Trackage or the Passenger Trackage shall become the property of UTA.

4.5 Excluding only (i) construction under Section 4.2 and 4.3 hereof, (ii) ordinary maintenance and repair work on the Joint Trackage (if UTA is maintaining the Joint Trackage pursuant to Section 3.4) and (iii) emergency work required for immediate safety reasons, UTA shall notify SLS in writing of any proposed work on the Joint Trackage and shall submit plans on any Modifications thereto. The parties, through the Coordination Committee, shall cooperate in good faith to ensure that such Modifications do not unreasonably interfere with or impede Freight Rail Service over the Right-of-Way.

SECTION 5. OPERATIONS

5.1 UTA shall have exclusive authority to manage, direct and control all activities on the Passenger Trackage. UTA shall have exclusive authority to control operations of all trains, locomotives, rail cars and rail equipment and the movement and speed of the same on the Passenger Trackage. SLS shall not have any right to operate on the Passenger Trackage.

5.2 SLS shall have exclusive authority to manage, direct and control all railroad and railroad-related operations on the Freight Trackage. SLS shall have exclusive authority to control operations of all trains, locomotives, railcars and rail equipment and the movement and speed of the same on the Freight Trackage. UTA shall not have any right to operate on trackage then designated as Freight Trackage.

5.3 Except as set forth in Sections 5.4-5.7, the trains, locomotives, rail cars and rail equipment of either party may be operated on the Joint Trackage without prejudice or partiality and in such a manner as will result in the most economical and efficient movement of all traffic.

5.4 In order to ensure safe, economical and reliable Freight Rail Service and Passenger Service, the parties hereby establish (i) a Freight Preference Period for the Right-of-Way between the

hours of 12:00 midnight and 5:00 a.m., Monday through Friday, inclusive, and (ii) a Passenger Preference Period for the Right-of-Way between the hours of 5:01 a.m. and 11:59 p.m., Monday through Friday, inclusive, and all Saturday and Sunday. SLS has inspected the Right-of-Way and reviewed the records of UPRR pertaining to Freight Rail Service on the Right-of-Way. Based on such investigation and review, SLS has determined that it can provide Freight Rail Service within the above Freight Preference Period. SLS agrees to employ such equipment and employees necessary to provide Freight Rail Service within the above Freight Preference Period. The Coordination Committee shall, at either party's request, meet to negotiate in good faith regarding proposed changes to the Freight Preference Period and the Passenger Preference Period.

5.5 During the Freight Preference Period, UTA shall not be authorized to operate trains or conduct Passenger Service on the Joint Trackage or the Passenger Trackage, without special permission from the dispatcher. During the Passenger Preference Period, SLS shall not be authorized to operate trains or conduct Freight Rail Service on the Joint Trackage or the Freight Trackage, without special permission from the dispatcher.

5.6 During the Freight Preference Period, SLS shall manage, direct and control, at SLS's sole expense, all activities on the Joint Trackage. During such period, SLS shall manage, direct and control all freight railroad and freight railroad-related

operations on the Joint Trackage and shall direct dispatching and control the entry and exit of all trains, locomotives, rail cars and rail equipment and the movement and speed of the same on the Joint Trackage and the Freight Trackage.

5.7 During the Passenger Preference Period, UTA shall manage, direct and control, at UTA's sole expense, all activities on the Joint Trackage. During such period, UTA shall manage, direct and control all activities on the Joint Trackage and shall direct dispatching and control the entry and exit of all trains, locomotives, rail cars and rail equipment and the movement and speed of the same on the Joint Trackage and the Passenger Trackage.

5.8 SLS shall pay all taxes, assessments, fees, charges, costs and expenses related solely to Freight Rail Service on the Right-of-Way or ownership of the Freight Easement. UTA shall pay all taxes, assessments, fees, charges, costs and expenses related solely to Passenger Service on the Right-of-Way or ownership thereof. The parties shall negotiate in good faith to allocate assessments, fees, charges, costs and expenses related to the Joint Trackage or shared use of the Right-of-Way; provided however, that nothing in this Section 5.8 shall be construed to require SLS to pay real estate or ad valorem taxes; provided further, that nothing in this Section 5.8 shall be construed to require either party to pay real estate or ad valorem taxes assessed against the other party.

SECTION 6. CLEARING OF OBSTRUCTIONS, DERAILMENTS AND WRECKS

6.1 If by reason of any mechanical failure or for any other cause not resulting from an accident or derailment, any train, locomotive, rail car or rail equipment of SLS becomes stalled or unable to proceed under its own power or unable to maintain proper speed on the Right-of-Way or if, in an emergency, crippled or otherwise defective cars are set out of a SLS train on the Right-of-Way, then UTA shall have the option to furnish motive power or such other assistance as may be necessary to haul, help, or push such train, locomotive, car or equipment, or to properly move the disabled equipment off the Right-of-Way, and SLS shall reimburse UTA for the reasonable and necessary cost of rendering any such assistance.

6.2 In the event of any derailment or wreck of a SLS train, SLS shall clear the Right-of-Way of all obstructions within a reasonable time. SLS also shall perform any rerailing or wrecking train service as may be required in connection with such derailment or wreck, in accordance with industry practices. In the event that SLS does not clear the Right-of-Way of obstructions within a reasonable time, UTA may clear the Right-of-Way of obstructions and SLS shall reimburse UTA for all reasonable and necessary costs incurred in performing such service.

SECTION 7. ALLOCATION OF LIABILITY

7.1 Both parties shall undertake to comply with all applicable federal, state and local laws and regulations, and all applicable rules, regulations or orders promulgated by any court, agency, municipality, board or commission. If any failure of either party to comply with such laws, rules, regulations or orders in respect to the use of the Right-of-Way results in any fine, penalty, cost or charge being assessed against the other party, or any Loss or Damage, the party which failed to comply agrees to reimburse promptly and indemnify, protect, defend and hold harmless the other Party for such amount.

7.2 Notwithstanding (i) anything else contained in this Coordination Agreement or (ii) otherwise applicable law regarding allocation of liability based on fault or otherwise, as between the parties hereto liability for Loss or Damage resulting from or in connection with the maintenance, construction, operations or other acts or omissions of either party shall be borne and paid by the parties as follows:

(a) When such Loss or Damage results from or arises in connection with the maintenance, construction, operations or other acts or omissions of only one of the parties, regardless of any third party involvement, such Loss or Damage shall be borne by that party; and

(b) When such Loss or Damage results from or arises in connection with the acts or omissions of both parties, or of third parties, or from unknown causes, Acts of God, or any other cause whatsoever, such liability shall be borne by the party or parties responsible under applicable law.

7.3 Each party agrees that it will pay for all Loss or Damage the risk of which it has herein assumed, the judgment of any court to the contrary and otherwise applicable law regarding liability notwithstanding, and will forever indemnify, protect, defend and hold harmless the other party, its successors and assigns, from such payment.

7.4 In the event that both parties hereto shall be liable under this Coordination Agreement for any claim, demand, suit or cause of action, and the same shall be compromised and settled by voluntary payment of money or valuable consideration by one of the parties, release from liability will be taken in the name of both parties and all of each party's officers, agents, and employees. Neither party shall make any such compromise or settlement in excess of $25,000 without prior, written authority of the other party having liability, which consent shall not be unreasonably withheld, but any settlement made by one party in consideration of $25,000 or less shall be a settlement releasing all liability of both parties and shall be binding upon both parties.

7.5 In case a lawsuit or lawsuits shall be commenced against either party hereto for or on account of any Loss or Damage for which the other party may be solely or jointly liable under this Coordination Agreement, the party thus sued shall give the other party timely written notice of the pendency of such suit, and thereupon the party so notified may assume or join in the defense thereof, and if the party so notified is liable therefor under this Coordination Agreement, to the extent of such liability, such party shall defend, indemnify and save harmless the party so sued from all Loss or Damage in accordance with the liability allocation set forth in this Coordination Agreement. Neither party shall be bound by any judgment against the other party unless it shall have been so notified and shall have had reasonable opportunity to assume or join in the defense of the action. When so notified, and said opportunity to assume or join in the defense of the action has been afforded, the party so notified shall to the extent of its liability under this Coordination Agreement be bound by such judgment.

7.6 Nothing in this Section 7 shall be construed as a waiver by UTA of any immunity, pursuant to Title 63, Chapter 30, Utah Code Annotated 1953, as amended, or applied so as to effectively constitute such waiver.

SECTION 8. TERM; TERMINATION

8.1 This Coordination Agreement shall terminate upon the termination of the Freight Easement.

8.2 Termination of this Coordination Agreement shall not relieve either party of their obligations or liabilities to the other party arising prior to such termination.

SECTION 9. COMPLIANCE WITH LAWS

UTA and SLS shall comply with the provisions of all applicable laws, regulations, and rules respecting the operation, condition, inspection, and safety of their respective trains, locomotives, cars and other equipment operated over the Right-of-Way. Each party shall indemnify, protect, defend and hold harmless the other, its affiliates, and any of its directors, officers, agents and employees from and against all fines, penalties, and liabilities imposed upon the other party, its affiliates or any of its directors, officers, agents, or employees under such laws, rules and regulations by any public authority or court having jurisdiction, when attributable to its failure to comply with the provisions of this section.

SECTION 10. CASUALTY LOSSES

10.1 In the event that any portion of the Right-of-Way that is being used by UTA for the continued provision of Passenger Service is damaged or destroyed by flood, fire, civil disturbance, earthquake, storm, sabotage or act of God, or accidents or vandalism caused by third parties or for which the cause is unknown, then, UTA may either (i) repair, or cause to be repaired, that portion of the Right-of-Way so damaged or destroyed to substantially the same condition as existed prior to such damage or destruction, or (ii) replace, or cause to be replaced, such portion with property of like kind, condition or quality. The cost and expense of such repair or replacement shall be borne by UTA.

10.2 In the event that any portion of the Right-of-Way that is being used by SLS for the continued provision of Freight Rail Service, and which is not also being used for Passenger Service, is damaged or destroyed by flood, fire, civil disturbance, earthquake, storm, sabotage or act of God, or accidents or vandalism caused by third parties or for which the cause is unknown, then, SLS may either (i) repair, or cause to be repaired, that portion of the Right-of-Way so damaged or destroyed to substantially the same condition as existed prior to such damage or destruction, or (ii) replace, or cause to be replaced, such portion with property of like kind, condition or quality. The cost and expense of such repair or replacement shall be borne by SLS; provided, however,

that SLS shall not be obligated under this Section 10.2 to repair or replace the damaged or destroyed portion of the Right-of-Way if in SLS's good faith judgment the cost thereof would be excessive or unreasonable taking into account the profitability of SLS's freight operations on the Right-of-Way, unless UTA shall agree to reimburse SLS for such cost.

10.3 Except when subject to Section 7, in the event any portion of the Right-of-Way is damaged or destroyed by accidents caused by either party or vandalism by the employees or agents of either party, and the party that caused the accident or whose employees or agents caused the vandalism shall bear the cost and expense thereof.

SECTION 11. COMPENSATION

11.1 Except as otherwise specifically provided in this Coordination Agreement, SLS and UTA shall have no obligation to pay or otherwise compensate each other in connection with this Coordination Agreement.

11.2 Any payments due and payable by SLS or UTA under this Coordination Agreement shall be paid within forty-five (45) days after receipt of an invoice therefor, by check delivered to the address of the payee as set forth in Section 13.4 hereof; provided, however, that in the event of a good faith dispute relating to a such payment, the disputed portion of the invoice shall be paid

with full reservation of rights to possible reimbursement upon resolution of such dispute. Any payments not made within forth-five (45) days of an invoice therefor shall thereafter be subject to interest charges, which shall accrue at the highest lawful rate for the forbearance of money.

11.3 Upon request, a party disputing the accuracy of any invoice shall be entitled to receive from the billing party copies of such supporting documentation and/or records as are kept in the ordinary course of the billing party's business and which are reasonably necessary to verify the accuracy of the invoice as rendered.

SECTION 12. INSURANCE

SLS, at its sole cost and expense, shall procure or cause to be procured and maintain or cause to be maintained during the continuance of this Coordination Agreement, railroad operating and liability insurance covering liability assumed by SLS under this Coordination Agreement with a limit of not less than Twenty-Five Million Dollars ($25,000,000) combined single limit for personal injury and property damage per occurrence, with deductible or self insurance not greater than Fifty Thousand Dollars ($50,000.00). SLS shall furnish to UTA certificates of insurance evidencing the above coverage in the form of a policy (or policies) at the time of execution of this Coordination Agreement. Such insurance shall contain a contractual liability endorsement which will cover the

obligations assumed under this Coordination Agreement and an endorsement naming UTA as "additional insured." In addition, such insurance shall contain notification provisions whereby the insurance company agrees to give thirty (30) days' written notice to the UTA of any change in or cancellation of the policy. All of these endorsements and notice provisions shall be stated on the certificate of insurance which is to be provided to UTA.

SECTION 13. GENERAL PROVISIONS

13.1 This Coordination Agreement and the agreements referenced herein constitute the entire agreement between the parties hereto with respect to the subject matter contained herein and there are no agreements, understandings, restrictions, warranties or representations between the parties other than those set forth or provided for herein. All Exhibits attached hereto are hereby incorporated by reference into, and made part of, this Coordination Agreement.

13.2 This Coordination Agreement may not be amended except by an instrument in writing signed by the parties hereto.

13.3 Waiver of any provision of this Coordination Agreement in whole or in part, can be made only by an agreement in writin signed by the parties and such waiver in any one instance shall nc constitute a waiver of any other provision in the same instance

nor any waiver of the same provision in another instance, but each provision shall continue in full force and effect with respect to any other then existing or subsequent breach.

13.4 A notice or demand to be given by one party to the other shall be given in writing by personal service, telegram, express mail, Federal Express, DHL or any other similar form of courier or delivery service, or mailing in the United States mail, postage prepaid, certified, return receipt requested and addressed to such party as follows:

(a) In the case of a notice or communication to the UTA, Attention: General Manager, P. O. Box 30810, Salt Lake City, Utah 84130-0810, with a copy to William D. Oswald, Attorney for the Purchaser, 201 South Main Street, 12th Floor, Lake City, Utah, 84111.

(b) In the case of a notice or communication to SLS addressed to the principal office of SLS, Attention: General Manager, Carl Hollowell, P. O. Box 57366, Murray, UT 84157, with a copy to the President of RailTex Services, Inc., 4040 Broadway, Suite 200, San Antonio, TX 78209 or addressed in such other way in respect to either party as that party may, from time to time, designate in writing dispatched as provided in this Section. All notices, demands, requests, and other communications under this Agreement shall be in writing and shall be deemed properly served and to have been duly given (i) on the date of delivery, if delivered personally on the party to whom notice is given, or if made by telecopy directed to the party to whom notice is to be given at the

telecopy number listed below, or (ii) on receipt, if mailed to the party to whom notice is to be given by registered or certified mail, return receipt requested, postage prepaid and properly addressed.

13.5 If any provision of this Coordination Agreement shall be held or be deemed to be or shall, in fact, be illegal, invalid, inoperative or unenforceable as applied in any particular case in any jurisdiction or jurisdictions or in all jurisdictions or in all cases because it conflicts with any other provision or provisions hereof or any constitution or statute or rule of law or public policy, or for any other reason, such circumstances shall not have the effect of rendering the provision in question inoperative or unenforceable in any other case or circumstance or of rendering any other provision or provisions herein contained illegal, invalid, inoperative, or unenforceable to any extent whatever. The invalidity of any one or more phrases, sentences, clauses or sections of this Coordination Agreement shall not affect the remaining portions of this Coordination Agreement or any part thereof.

13.6 This Coordination Agreement: (i) contains headings only for convenience, which headings do not form part of and shall not be used in construction; and (ii) is not intended to inure to the benefit of any person or entity not a party.

13.7 All of the terms and provisions of this Coordination Agreement shall be binding upon and inure to the benefit of, and be enforceable by, the parties hereto and their respective successors and permitted assigns. Except to a corporate parent, subsidiary or other affiliate, SLS may not assign its rights or obligations under this Coordination Agreement.

13.8 This Coordination Agreement may be executed in counterparts, each of which shall be considered an original, but all of which together shall constitute but one and the same instrument.

13.9 This Coordination Agreement shall be governed by and construed under the laws of the State of Utah, including conflict of laws principles.

IN WITNESS WHEREOF, the parties hereto have caused this Coordination Agreement to be executed as a sealed instrument as of the date first set forth above by their duly authorized representatives.

WITNESS:

SALT LAKE CITY SOUTHERN RAILROAD CO., INC.

By: _____

Title: _____

WITNESS:

UTAH TRANSIT AUTHORITY

By:

Title:

By:

Title: General Manager

EXHIBIT "A"

DESCRIPTION OF TRACKAGE SUBJECT TO SLS'S FREIGHT EASEMENT

UP's freight railroad line located between Ninth Street Junction, on the north side of NINTE (900) SOUTE STREET, Salt Lake City, Utah (approximately milepost 796.74) and the Salt Lake County/Utah County boundary line (approximately milepost 775.19) consisting of approximately 23.55 miles, as shown on the UP's Chief Engineer's Alignment Maps of the Union Pacific Provo Subdivision Line and as shown on the Oregon Shortline Railroad Station Maps - Lands aka Property Accounting Valuation Maps;

UP's spur freight railroad line which departs in a southwesterly direction from the Provo Subdivision Line at approximately 6400 South in Murray, Utah (approximately milepost 790.52) crossing under both the I-15 freeway and the D&RGW Railroad main line, and then heading south to approximately 7400 South, to the point of intersection with the D&RGW right of way (approximately milepost 1.402), a distance of about 1.4 miles, as shown on the UP's Chief Engineer's Alignment Maps of the Union Pacific Provo Subdivision Line and as shown on the Oregon Shortline Railroad Station Maps - Lands aka Property Accounting Valuation Maps;

The trackage on that portion of the Property sold by Seller to UTA located in the center of historic Sandy (Old Town) which extends from approximately 8600 South to 9000 South along the UPRR Right-Of-Way and running from approximately 150 East to 190 East; the east-west width of this property is approximately 260 feet, more or less, with the exception of a small portion on the north end which is narrower, and its length from north to south is approximately 2560 feet;

The trackage on that portion of the Property sold by Seller to UTA situated between 5410 and 5830 South Streets at 300 West and which is approximately 2500 feet long and 125 feet wide.

BUT LESS AND EXCEPTING THEREFROM THE FOLLOWING DESCRIBED PARCELS OF PROPERTY WHICH ARE NOT INCLUDED IN OR SUBJECT TO THE FREIGHT RAILROAD OPERATING EASEMENT:

SEE THE DESCRIPTIONS ON THE FOLLOWING PAGES

A piece of land one hundred (100) feet wide, situate in the Southwest quarter of the Northeast quarter, and the Northwest quarter of the Southeast quarter of Section Thirteen (13), Township Two (2) South, Range One (1) West, Salt Lake Meridian, and more fully described as follows, to-wit:

Beginning at a point on the East and West center line of said Section Thirteen (13), seven hundred forty-nine and one tenth (749.1) feet East from the center of said section, said point being fifty (50) feet East along said center line of said section from where it is intersected by the center line of the main track of the Oregon Short Line Railroad; thence North no degrees and thirty minutes (0°30') East, on a line parallel with said center line of main track and fifty (50) feet distant therefrom at right angles, six hundred fifteen and twelve-hundredths (615.12) feet, thence North eighty-one degrees and fifty minutes (81°50')East, one hundred one and fifteen hundredths (101.15) feet; thence South no degrees and thirty minutes (0°30)West, eight hundred sixty-two and seventy-three hundredths (862.73) feet; thence North eighty-nine degrees and thirty minutes (89°30') West one hundred (100) feet to a point fifty (50) feet Easterly from aforesaid center line of main track of the Oregon Short Line Railroad; thence North no degrees and thirty minutes (0°30') East two hundred thirty-three and sixty-eight hundredths (233.68) feet to the place of beginning.

A strip of land 100 feet wide, in the Northeast 1/4 of Section 13, T.2S., R.1W., Salt Lake Base and Meridian, lying East of and adjacent to the present right of way of the Oregon Short Line Railroad Company. Said strip being more particularly described as follows:

Beginning at a point 1854 feet, more or less, West and 311 feet, more or less, South of the Northeast corner of said Section 13, said point being on the East right of way line of the Oregon Short Line Railroad 50 feet from the center line of its main line, and at the Southwest corner of the American Smelting and Refining Company's property; thence South 0°30' W., parallel to said center line, 1691.8 feet; thence North 81° E. along the South side of John Berger's land, 101.4 feet; thence North 0°30E., parallel to and 150 feet from said center line of Oregon Short Line main line, 1687 feet; thence South 83°30W. 100.8 feet to the place of beginning.

The following described land claim, to wit; Part of Lot three (3),and part of the Southeast quarter of the Northest quarter of Section Six (6), in Township Three (3) South, of Range One (1) East, Salt Lake Meridian.

Beginning eight 5/10 (8 5/10) rods East from the Northwest corner of said lot three; thence East nineteen 40/100 rods; thence South one hundred and sixty (160) rods; thence West nineteen 40/100 rods; thence West one hundred and sixty (160) rods to the place of beginning.

Less and excepting the following parcels of property, which are included with the Retained Freight Operating Easement:

1. That portion within the bounds of the existing single line through track which is approximately 66 feet in width.

2. That portion of the land lying between the single line through track and 14 feet East and abutting the center line of the Easterly most track of the existing siding track situated in Lots 40, 49, and 62, Sandy Station Plat.

EXHIBIT "B"

DESCRIPTION OF PRESENT CONDITION OF TRACK, GRADE CROSSINGS AND SIGNAL FACILITIES REGARDING THE PROPERTY AS OF CLOSING

TRACK:

The entirety of the main track rails on the Property are 133 pound rails (133 pounds per yard) and are in good condition.

The main track on the Property between the Salt Lake County/Utah County boundary line and north of the north end of Pallas Yard, at approximately 5330 South, Murray, Utah is FRA Class III because of the condition of the railroad ties.

The main track between approximately 5330 South, Murray, Utah, and Ninth Street Junction, approximately 300 feet north of the north side of 900 South Street in Salt Lake City, Utah is generally FRA Class III but with several areas that are only FRA Class II because of the condition of railroad ties and occasional insufficient crosslevelling.

All spur tracks, team tracks and yard tracks on the Property, including the tracks at Pallas Yard, are FRA Class I.

SIGNAL FACILITIES:

All of the signal facilities regarding the Property are in good working condition.

GRADE CROSSINGS:

All of the grade crossings regarding the Property are in good condition.

Tab 2

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8
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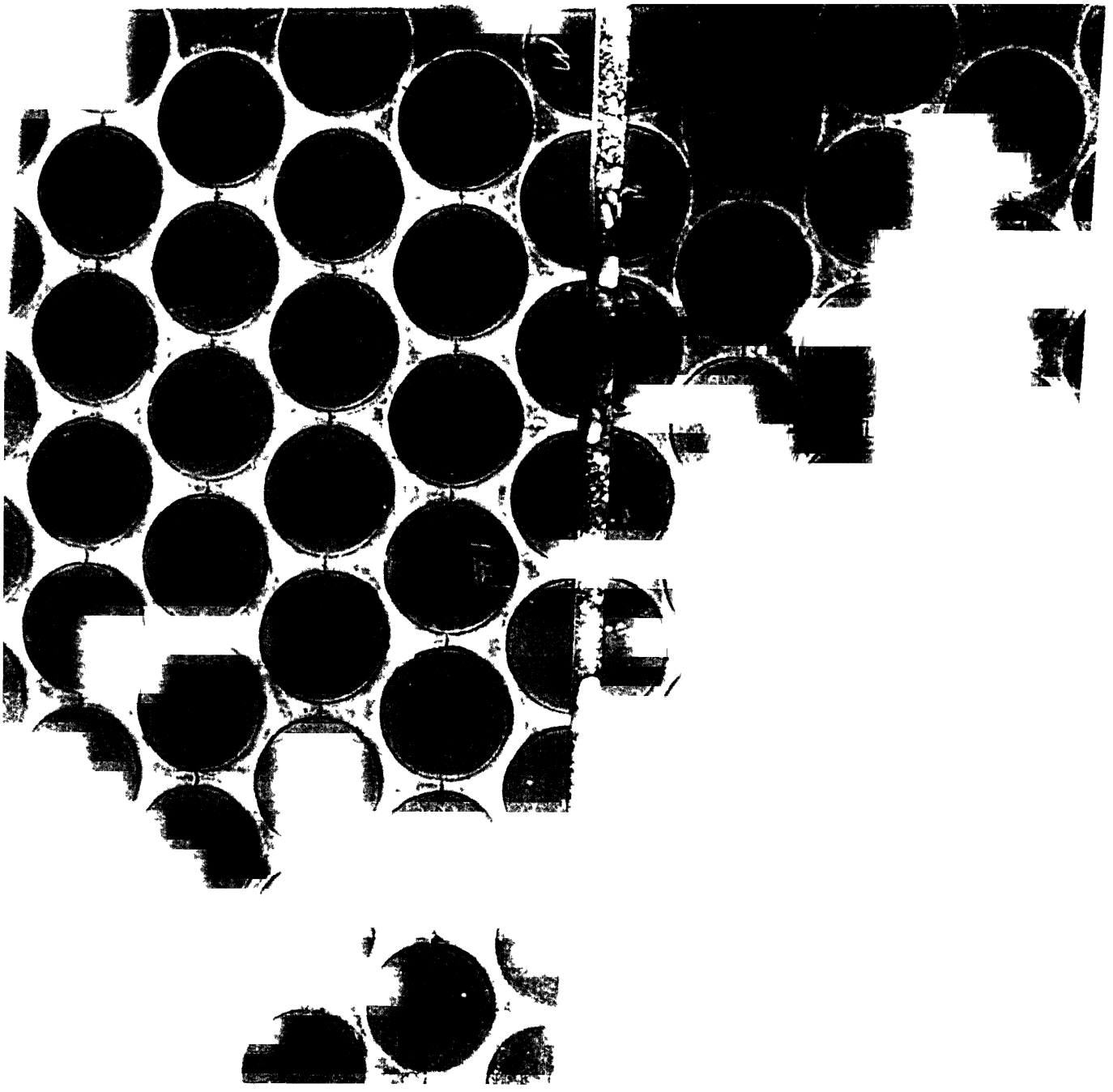
Tab 3



Tab 4

ARTICLE 7. LEVY OF SPECIAL TAXES BY CITIES AND TOWNS

§§ 10–7–21 to 10–7–25. Repealed by Laws 1969, c. 27, § 43

§ 10–7–26. Streets and alleys used by railway companies

(1) As used in this section and in sections 10–7–27, 10–7–29, 10–7–30, 10–7–31, 10–7–32, and 10–7–33, the terms "railway company" or "street railway company" means any company which owns or operates railway tracks on, along or across a street or alley in any city or town.

(2) Nothing contained in this section or in the sections referred to in subsection (1) shall be construed to exempt any railway company from keeping every portion of every street and alley used by it and upon or across which tracks shall be constructed at or near the grade of such streets in good and safe condition for public travel, but it shall keep the same planked, paved, macadamized or otherwise in such condition for public travel as the governing body of the city or town may from time to time direct, keeping the plank, pavement or other surface of the street or alley level with the top of the rails of the track. The portions of the streets or alleys to be so kept and maintained by all such railway companies shall include all the space between their different rails and tracks and also a space outside of the outer rail of each outside track of at least two feet in width, and the tracks herein referred to shall include not only the main tracks but also all sidetracks, crossings and turnouts constructed for the use of such railways.

Laws 1969, c. 27, § 42.

Codifications R.S. 1898, § 259; C.L. 1907, § 259; C.L. 1917, § 677; R.S. 1933, § 15–7–25; C. 1943, § 15–7–25.

Cross References

Municipal Improvement District Act, see § 17A–3–301 et seq.

Library References

Railroads ⇐95.
Westlaw Key Number Search: 320k95.
C.J.S. Railroads §§ 331 to 340, 355.

§ 10–7–27. Street railway companies to restore streets

Every street railway company shall at its own expense restore the pavement, including the foundation thereof, of every street disturbed by it in the construction, reconstruction, removal or repair of its tracks, to the same condition as before the disturbance thereof, to the satisfaction of the governing body having charge of such street. The obligation imposed hereby shall, in cities other than cities of the first class, be in lieu and substitution of any and all other obligations of any such company to pave, repave or repair any street, or to pay any part of the cost thereof, and may be enforced in the same manner as similar obligations are or may be enforced under the laws of this state. Nothing herein contained shall be considered to relieve any such company from

Tab 5

Library References

Railroads ⇐95.
Westlaw Key Number Search: 320k95.
C.J.S. Railroads §§ 331 to 340, 355.

Notes of Decisions

1. Street improvements

Under Comp. Laws 1907, § 273, and in spite of section 266, a railroad company owning the right of way across which a street is to be paved may validly protest against the improvement. Cave v. Ogden City, 1917, 51 Utah 166, 169 P. 163. Municipal Corporations ⇐ 297(1)

2. Public service commission

The Public Service Commission has no power to issue an order taking precedence over conflicting terms of franchise granted railroad company by city to construct and maintain track on city street, nor is Commission's consent necessary to city's exercise of its proper rights within such terms. Rev.St.1933, 15-8-33, 15-8-82, 76-4-1, 77-0-8. Union Pac. R. Co. v. Public Service Commission, 1943, 103 Utah 186, 134 P.2d 469. Urban Railroads ⇐ 6

3. Revocation of franchise

A city, having statutory power to grant railroad company a franchise to construct and maintain single track railway on certain street, had power to impose conditions as to duration of franchise and revoke it for violation of such conditions, and hence could require company to take up and remove its tracks and trolley poles. Rev.St.1933, 15-7-28, 15-8-33, 15-8-82, 77-0-8. Union Pac. R. Co. v. Public Service Commission, 1943, 103 Utah 186, 134 P.2d 469. Urban Railroads ⇐ 6

Since city's powers to revoke franchise, granted by it to railroad company, for construction and maintenance of track in certain street, and to order removal of such track, were granted by legislature, prohibition proceeding to restrain Public Service Commission from investigating railroad companies' right to remove track presents no question of delegation of municipal functions to a special commission in violation of constitution. Rev.St.1933, 15-8-33, 15-8-82, 77-0-8; Const. art. 6, § 29; art. 12, § 10. Union Pac. R. Co. v. Public Service Commission, 1943, 103 Utah 186, 134 P.2d 469. Urban Railroads ⇐ 6

4. Repeals

The statute granting Public Service Commission exclusive power to prescribe manner and terms on which railroad tracks may be constructed and maintained across public streets did not impliedly repeal statutes conferring general powers on municipalities to control use and occupancy of their streets by railroads. Rev.St. 1933, 15-8-8, 15-8-33, 15-8-82, 76-4-1, 76-4-10, 76-4-15, 76-4-24(3), 77-0-8. Union Pac. R. Co. v. Public Service Commission, 1943, 103 Utah 186, 134 P.2d 469. Urban Railroads ⇐ 2

§ 10-7-30. Failure to pay for repairs—Lien on company's property

In the event of the refusal of any such company to pave, repave or repair as required herein when so directed, upon the paving or repaving of any street upon which its track is laid, the municipality shall have power to pave, repave or repair the same, and the cost and expense of such paving, repaving or repairing may be collected by levy and sale of any property of such company in the same manner as special taxes are now or may be collected. Special taxes for the purpose of paying the cost of any such paving or repaving, macadamizing or repairing of any such railway may be levied upon the track, including the ties, iron, roadbed, right of way, sidetracks and appurtenances, and buildings and real estate belonging to any such company and used for the purpose of such railway business all as one property, or upon such parts of such track, appurtenances and property as may be within the district paved, repaved, macadamized or repaired, and shall be a lien upon the property levied upon from the time of the levy until satisfied. No mortgage, conveyance, pledge,

the repayment of any money which has heretofore been advanced or expended by any city for any paving heretofore done under or by virtue of a specific contract or agreement made and entered into between the board of commissioners or the city council of any city and such company providing for the repayment thereof, but the obligation for such repayment shall be and remain enforceable as if this section had not been passed.

Laws 1927, c 77, § 1

Codifications R S 1933, § 15–7–26, C 1943, § 15–7–26

Library References

Railroads ⇐95
Westlaw Key Number Search 320k95
C J S Railroads §§ 331 to 340, 355

§ 10–7–28. Repealed by Laws 1969, c. 27, § 43

§ 10–7–29. Railway companies to repave streets

All railway companies shall be required to pave or repave at their own cost all the space between their different rails and tracks and also a space two feet wide outside of the outer rails of the outside tracks in any city or town, including all sidetracks, crossings and turnouts used by such companies. Where two or more companies occupy the same street or alley with separate tracks each company shall be responsible for its proportion of the surface of the street or alley occupied by all the parallel tracks as herein required. Such paving or repaving by such railway companies shall be done at the same time and shall be of the same material and character as the paving or repaving of the streets or alleys upon which the track or tracks are located, unless other material is specially ordered by the municipality. Such railway companies shall be required to keep that portion of the street which they are herein required to pave or repave in good and proper repair, using for that purpose the same material as the street upon which the track or tracks are laid at the point of repair or such other material as the governing body of the city may require and order; and as streets are hereafter paved or repaved street railway companies shall be required to lay in the best approved manner a rail to be approved by the governing body of the city. The tracks of all railway companies when located upon the streets or avenues of a city or town shall be kept in repair and safe in all respects for the use of the traveling public, and such companies shall be liable for all damages resulting by reason of neglect to keep such tracks in repair, or for obstructing the streets. For injuries to persons or property arising from the failure of any such company to keep its tracks in proper repair and free from obstructions such company shall be liable and the city or town shall be exempt from liability. The word "railway companies" as used in this section shall be taken to mean and include any persons, companies corporations or associations owning or operating any street or other railway in any city or town.

Codifications R S 1898, § 266, C L 1907, § 266, C L 1917, § 684, R S 1933, § 15–7–28, C 1943, § 15–7–28

Tab 6

§ 56-1-11. Maintenance of crossings

Every railroad company shall be liable for damages caused by its neglect to make and maintain good and sufficient crossings at points where any line of travel crosses its road.

Codifications R.S. 1898, § 445; C.L. 1907, § 445; C.L. 1917, § 1237; R.S. 1933, § 77-0-11; C. 1943, § 77-0-11.

Library References

Railroads ⚿303(1).
Westlaw Key Number Search: 320k303(1).
C.J.S. Railroads § 1002.

Notes of Decisions

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1. Duty of railroad

Statutes and ordinances requiring precautions in running trains for the public safety do not exclude the general common-law obligation to use due care and diligence. Smith v. San Pedro, L.A. & S.L.R. Co., 1909, 35 Utah 390, 100 P. 673. Railroads ⚿ 223

A railroad is liable, if, knowing sheep are on the track, it negligently runs over them. Smith v. San Pedro, L.A. & S.L.R. Co., 1909, 35 Utah 390, 100 P. 673. Railroads ⚿ 419(1)

One driving sheep in a street not being a trespasser, the railroad was bound, not only to operate its train with due care after discovering the sheep on the track, but to exercise care in anticipating dangers which might be expected to arise from proper use of the highway by the public, and would be liable for injuries to them caused by failure to do so. Smith v. San Pedro, L.A. & S.L.R. Co., 1909, 35 Utah 390, 100 P. 673. Railroads ⚿ 419(1)

In suit for injuries to sheep driven along a street through which defendant's road ran, plaintiff could show that at certain times of the year large numbers were driven at that place, as bearing on care required of trainmen at that place during such time. Smith v. San Pedro, L.A. & S.L.R. Co., 1909, 35 Utah 390, 100 P. 673. Railroads ⚿ 442(1)

2. Duty of person crossing tracks

Where the complaining party injured at a railroad crossing has not complied with the legal duties imposed on him, he cannot recover as a matter of law, regardless of defendant's negligence. Wilkinson v. Oregon Short Line R. Co., 1909, 35 Utah 110, 99 P. 466. Railroads ⚿ 330(1)

While travelers may rely for protection on the statutory signals required to be given, failure to give the signals does not relieve them from the duty of exercising ordinary care for their own safety. Wilkinson v. Oregon Short Line R. Co., 1909, 35 Utah 110, 99 P. 466. Railroads ⚿ 330(3)

Plaintiff driving a horse attached to a wagon entered a street on which defendant's railroad was located. He then saw an engine standing on a switch about 400 yards from the crossing. At the time he looked plaintiff was between 70 and 75 yards north of the crossing, and he, believing that the engine would remain on the switch because it was nearly time for another train, paid no more attention to the engine. When he turned to cross the track, he saw the engine approaching without having rung the bell or blown the whistle at a speed of from 12 to 20 miles an hour, and it struck plaintiff's wagon before he could escape. Held, that plaintiff was negligent as a matter of law. Wilkinson v. Oregon Short Line R. Co., 1909, 35 Utah 110, 99 P. 466. Railroads ⚿ 332

Where plaintiff was driving along the side of a railroad track in a place of safety, and, without looking, attempted to cross the track in front of an approaching engine, and was struck and injured, he was not entitled to recover on the ground that defendant's servants by the exercise of ordinary care could have seen him going into a place of danger, and could have prevented the accident. Wilkinson v. Oregon Short Line R. Co., 1909, 35 Utah 110, 99 P. 466. Railroads ⚿ 338.1

3. Trespassers

One driving sheep along a public street through which a railroad ran was not a trespasser; the rights and duties of the drover and the railroad in the street being mutual and

Tab 7

14.44.030 Grade crossings—Planking and paving.

A. Every railway company operating within the boundaries of the city shall keep every portion of every city street or alley upon or across which their tracks shall be or are constructed and maintained in good and safe condition to accommodate public travel. For this purpose, each railway company will install and maintain the materials required in the manner specified from time to time in writing by the mayor to surface and maintain the same in good condition for public travel.

B. The portions of the street or alley surfaces to be so maintained by all such railway companies shall include all the space between their different rails and tracks and also the space outside the outer rail of each outside track for a distance of two feet, measured from the outside edge of the rail, for the full width of the street or alley, including sidewalks, or length of said street or alley, unless otherwise directed by the mayor.

C. At all times, the surface of the street or alley shall be maintained level with the top of the rails on the track. After being directed in writing to surface or perform maintenance work on an area of trackage, each such railway company shall complete the work specified by the mayor within seven days on small roadway repairs or thirty days for major capital improvements, or such other reasonable time as specified by the city. Every railway company which fails or refuses to comply with such notice, within the time specified, shall pay to the city all costs and expenses incurred by the city or others at its direction for performing the required surfacing and/or maintenance work and the city may thereafter recover such costs and expenses, including attorneys fees incidental thereto, in a civil action brought against such railway company in any court having jurisdiction thereof. (Prior code § 35-1-5)

14.44.040 Viaducts and bridges—Required when.

Such railroads shall, when required by the mayor, construct suitable viaducts over all streets when life or property may be endangered by the ordinary